NO. 100669-1
COURT OF APPEALS NO. 80305-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JIMI JAMES HAMILTON,

Petitioner.

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

The Honorable Eric Lucas, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Jimi James Hamilton, the respondent below, seeks review of the Court of Appeals decision, State v. Hamilton, ___ Wn. App. 2d ___, 2021 WL 5447058, No. 80305-1-I (Nov. 22, 2021) (Appendix A) following denial of his motion for reconsideration on January 19, 2022 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Once the Court of Appeals transfers transcripts for consideration on appeal and that decision becomes final, and then one party relies on the transcripts to argue the appeal on the merits, does it violate basic due process to then refuse to consider the transcripts on appeal and inform the parties the transcripts will not be used for the first time in the merits opinion?

2. Should this case be remanded to the Court of Appeals to reevaluate the case by considering the transcripts transferred to and originally accepted by the Court of Appeals

given that several rules and authorities indicate that the transcripts should be part of the record?

C. STATEMENT OF THE CASE

On August 23, 2012, Mr. Hamilton was housed in the Special Offender Unit at Monroe Correctional Complex. CP 175 (finding of fact 2); RP[1] (Sept. 16, 2014) 158-59. In this unit, there was a 14- or 16-channel video surveillance system, all of which was functioning properly on August 23, 2012. RP (Sept. 16, 2014) 158-60.

On that day, Mr. Hamilton was very agitated. He had previously reported sexual misconduct by a staff member with another inmate. CP 68; RP (Sept. 17, 2014) 26-28, 34, 65-66, 74-75; RP (Sept. 18, 2014) 26, 117-18, 143, 145; RP (Sept. 19, 2014) 118; RP (Sept. 23, 2014) 106-08. He came to believe that that report had not been kept confidential. CP 68. On the same

[1] Mr. Hamilton refers to the July 17, 2019 verbatim report of proceedings as "RP." He refers to any other verbatim report of proceedings from his 2014 trial by reference to the date of the transcript.

day, Mr. Hamilton was supposed to find out whether he was going to be transferred out of the Special Offender Unit into general population, asking multiple times about the status of his transfer. RP (Sept. 17, 2014) 42-43, 47-48, 141, 144; RP (Sept. 18, 2014) 7, 24-25, 110-14.

Correctional Officer Louis Montgomery described Mr. Hamilton as "upset" as evidenced by his stuttering, which he does when he gets anxious. RP (Sept. 17, 2014) 36. However, Mr. Montgomery said he had calmed down after telling Mr. Hamilton to maintain composure and "not let this kind of stuff get him upset." RP (Sept. 17, 2014) 28-29, 35-36. Another officer described him as agitated and fidgety. RP (Sept. 18, 2014) 81-82. Yet another officer, Alexandr Kozlovskiy did not notice anything different or unusual about his demeanor. RP (Sept. 19, 2014).

Mental health unit supervisor, Deborah Franek, stated Mr. Hamilton had repeatedly approached her to inquire about his sexual misconduct complaint, describing him as "anxious" and accusing staff of "poking at him, trying to upset him or get him

going." RP (Sept. 18, 2014) 111. She was "confused about the exact sequence of event" but stated she "put him off" repeatedly. RP (Sept. 18, 2014) 112-14. She described each time he approached her as "the same thing" or not "spectacularly different" but noted he became more urgent and insistent and seemed "stress." RP (Sept. 18, 2014) 114.

Inmates who observed Mr. Hamilton that morning noted he was having a bad day, making wild accusations, was upset, expressed anxiety and paranoia, and exhibited more stress that day than usual. RP (Sept. 18, 2014) 7, 20, 24-25. One inmate reported that Mr. Hamilton stated, "I'm ready to snap." RP (Sept. 17, 2014) 143.

Officer Kozlovskiy had told Mr. Hamilton to stop "stalking" the counselor's office and to stay away from their windows and doors; Mr. Hamilton agreed to do so though denied stalking behavior. RP (Sept. 19, 2014) 75-76. Mr. Hamilton asked Off. Kozlovskiy to pull videotape to establish he was not

actually by the office but Off. Kozlovskiy told him no. RP (Sept. 19, 2014).

Mr. Hamilton filed two emergency grievances in response to the claim he was stalking and in response to the perceived brief of confidentiality pertaining to the Prison Rape Elimination Act complaint. Ex. 82; Ex. 83.

Later that morning, Mr. Hamilton approached another correctional officer, Nicholas Trout, about filing a grievance, Mr. Trout ordered Mr. Hamilton to return to his cell; after initially complying, Mr. Hamilton turned around, ran at Mr. Trout, and repeatedly punched him, injuring him. CP 58, 171-72.

Mr. Hamilton believed he was attacking another inmate in self-defense, rather than Mr. Trout, because he was experiencing a delusion. RP (Sept. 23, 2014) 128-31. At his 2014 trial, his expert, Dr. Stuart Grassian, testified that Mr. Hamilton suffered from serious mental health issues given that he had spent so much time in solitary confinement and was experiencing a dissociative episode. RP (Sept. 22, 2014) 57, 64-66, 68-69, 76-

77, 89-90, 94-99, 105-06. Thus, Dr. Grassian believed Mr. Hamilton was unable to form the requisite intent to assault Mr. Trout. RP (Sept. 22, 2014) 105-06.

Mr. Hamilton was interviewed by Detective Barry Hatch after the alleged assault of Mr. Trout on the same day, August 23, 2012. Based on what "Hamilton had told me" he "suspected that [mental health may be a defense." RP (Sept. 23, 2014) 31. Det. Hatch "knew that it may be an issue" "from the time [he] interviewed Mr. Hamilton" "on August 23rd, 2012." RP (Sept. 23, 2014) 31. In a search warrant affidavit prepared later, Det. Hatch stated that based on the August 23, 2014 interview with Mr. Hamilton, "your Affiant believes the information contained within the prison records maintained by the Department of Corrections for Inmate Hamilton, may refute a claim of mental illness or drug induced impairment." CP 280.

Det. Hatch's trial testimony also confirmed that "I did interview people that he had brought up that were supervisors in the unit that he mentioned" in order to investigate what Mr.

Hamilton said about his mental state. RP (Sept. 23, 2014) 32. This included Deborah Franek, one the mental health unit supervisors, who was interviewed on August 23, 2012. Ex. 95. She described Mr. Hamilton's increasing agitation, getting "angry" and "ramping up" on that morning leading up to the alleged assault. Ex. 95 at 5.

Det. Hatch, however, did not request any videotape of the events and interactions leading up to the alleged assault. He confirmed that video of Mr. Hamilton's actions in the "back closet," the "day room," and the "PAB room" would have been captured on video. RP (Sept. 23, 2014) 30. He acknowledged that that video evidence would have been relevant but let the Department of Corrections decide which portions to provide him. RP (Sept. 23, 2014) 25, 31.

The state charged Mr. Hamilton with second degree assault. CP 169. Five days later, an attorney filed a notice of appearance and demanded discovery pursuant to CrR 4.7(a),

which includes video surveillance of the defendant's premises and conversations. CP 164.

The case proceeded to jury trial, and Mr. Hamilton was convicted of second degree assault. CP 153. The Court of Appeals reversed Mr. Hamilton's conviction and remanded the case for a new trial. State v. Hamilton, 196 Wn. App. 461, 474, 383 P.3d 1062 (2016).

On remand, Mr. Hamilton filed a motion to dismiss the prosecution on due process grounds because the state had failed to preserve video footage of the various events and conversations leading up to the alleged assault. CP 85-105. The state opposed the motion, CP 14-83, and a hearing was held.

At the hearing, the state did not dispute a single fact as set forth in the defense motion. The state acknowledged, "The entire crux of this case comes down to the defendant's mental state." RP 9. Rather than dispute the facts, the state argued only legal points, implicitly adopting the defense's rendition of the facts. RP 29-57, 60-62. Likewise, the state's written submission

addresses only legal standards; it did not dispute any facts. CP 14-33.

The trial court acknowledged testimony from the 2014 trial, discussing Mr. Hamilton's diminished capacity defense, and noted such testimony was "in the record." RP 33. The state also referenced the trial testimony repeatedly, inviting the trial court to review the portions of the transcripts discussed. RP 31, 34-35, 37.

The trial court issued a letter ruling granting Mr. Hamilton's motion to dismiss, laying out the pertinent facts and legal analysis that the destroyed videotape evidence was materially exculpatory, was potentially useful, and that the state had acted in bad faith. CP 4-12. The trial court repeatedly stated that the pertinent facts were not in dispute. CP 5-6.

Later, the trial court entered an order of dismissal, noting that its decision would be "further memorialized in written findings and conclusions of law entered at a later date." CP 13. The state filed a notice of appeal five days later. CP 1. A few

months later, the trial court entered its findings and conclusions, which formalized the same facts and legal analysis that were included in its letter ruling. CP 174-81.

On appeal, the state challenged the trial court's findings that were entered without notice and contended that the trial court's findings were not supported by substantial evidence in the record. Br. of Appellant at 1-2, 7-16. In response, Mr. Hamilton moved to transfer portions of the 2014 trial court proceedings to the Court of Appeals, asking the Court of Appeals to consider them on review and contending that they provide the factual support for the trial court's findings that the state contends are lacking. Br. of Resp't at 17-28. The Court of Appeals granted Mr. Hamilton's motion to transfer the transcripts.

The state moved to modify this ruling and Mr. Hamilton answered the state's motion to modify. A panel denied the motion to modify and the case proceeded. The state did not seek further review of the panel's order denying the motion to modify, despite being advised that the "order will become final unless

counsel files a motion for discretionary review within thirty days from the date of this order. RAP 13.5(a)."

The Court of Appeals opinion that later issued refused to consider the transferred transcripts in addressing the merits of the parties' arguments. Hamilton, slip op. 4-5. Mr. Hamilton moved for reconsideration, contending that the Court of Appeals was pulling the rug out from the entire appeal by notifying the parties for the first time in its decision that the transcripts would not be considered. This motion was denied.

D. ARGUMENT IN SUPPORT OF REVIEW

1. The Court of Appeals' bait and switch about permitting the trial transcripts to be considered as part of the appellate record deprived Mr. Hamilton of notice, an opportunity to be heard, and the assistance of appellate counsel

When Mr. Hamilton filed his brief in the Court of Appeals, he moved to transfer certain portions of the 2014 trial transcripts from the previous appeal. The commissioner granted Mr. Hamilton's motion. The state moved to modify this ruling. Mr. Hamilton answered the state's motion to modify. A panel denied

the state's motion to modify. The state did not seek further review of the panel's order despite being advised that the "order will become final unless counsel files a motion for discretionary review within thirty days from the date of this order. RAP 13.5(a)."

Mr. Hamilton thought he had litigated the issue of whether the 2014 trial transcripts would be considered on appeal and that he had prevailed. He relied on the now final June 29, 2021 order that the transcripts would be considered, as the state's challenge to their inclusion in the appellate record had failed. The Court of Appeals' decision to disregard its own June 29 order and refuse the transcripts without notice to Mr. Hamilton should be reviewed under RAP 13.4(b)(3) and (4).[2]

[2] Incongruously, the Court of Appeals seemed willing to consider the transcripts in noting that Mr. "Hamilton acknowledges that witness accounts were available and that many of these referred to Hamilton as being anxious, paranoid, and stressed that morning." Slip op. at 11. The varied and inconsistent witness accounts acknowledged by Mr. Hamilton, however, come directly from the 2014 trial transcripts. Br. of Resp't at 23-25.

Basic ingredients of due process of law are notice and an opportunity to be heard. Washington v. Texas, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Beaver, 184 Wn.2d 321, 358 P.2d 358 (2015). These basic ingredients were not honored by the Court of Appeals here, first allowing and then disallowing the same set of transcripts for consideration. By rejecting the transcripts for the first time in the merits opinion, the Court of Appeals pulled the rug out from under the appeal. Indeed, the Court of Appeals has created a vastly different factual and legal landscape that calls for a completely different assessment of the case—there is a completely different record available now that when the issue was briefed. Because this considerable restructuring of the issues and arguments available in the appeal occurred for the first time in the merits decision, Mr. Hamilton lacked notice and an opportunity to be heard on the issue. Review is appropriate under RAP 13.4(b)(3).

Mr. Hamilton is also left without the meaningful assistance of counsel under the Sixth Amendment and article I, section 22. Had he known that the transcripts were not going to be considered, his position would necessarily have changed. He would necessarily have requested remand so the parties could fully and fairly adduce all the pertinent facts. As it stands, the Court of Appeals decision renders all the arguments and positions taken by his counsel a complete nullity. The Court of Appeals decision—a bait and switch about what comprises the appellate record—violates basic due process and the ability of Mr. Hamilton to be adequately represented in his defense. This bizarre outcome merits review as an important constitutional question and a question of public interest. Review is appropriate under RAP 13.4(b)(3) and (4).

2. **The trial court and the prosecution both indicated in the trial court that the transcripts were available, so it proper for the transcripts to be considered on appeal as well**

The Court of Appeals refused to consider the transcripts, first suggesting that transcripts from this same case were "inadmissible evidence" without analysis. Hamilton, slip op. at 6. But this evidence was not inadmissible. Portions of the trial transcript became relevant later to establish certain facts about the nature of certain destroyed evidence and the state's knowledge of that destruction. The state and the trial court repeatedly acknowledged precisely this by repeatedly referring to the 2014 trial transcripts. RP 31, 34-35, 37. They were part of the record in the trial court, the state conceded the transcripts were relevant to the litigation in the trial court, and so there is no basis for the Court of Appeals' conclusion that the transcripts were "inadmissible."

In its motion to modify, the state characterized the transcripts as "evidence" that was not presented to the trial court.

It is true that the trial transcripts were not admitted as exhibits at the Brady[3] hearing. Mot. to Modify at 3. But no evidence was admitted at the hearing, and yet the state did not dispute a single fact at the hearing or in its pleadings submitted before the hearing.[4] So, there was no reason for the trial court to "admit" portions of the transcripts that are already part of the case record for this ongoing criminal prosecution, a record that both the prosecution and trial court acknowledged at the hearing were readily available and accessible, apparently by all involved.

In its motion to modify the ruling transferring the transcript, the state cited State v. Elmore, 139 Wn.2d 250, 985

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

[4] The Court of Appeals also states that Mr. Hamilton mischaracterizes the record in asserting that the state did not meaningfully dispute facts, pointing out that the state did dispute (1) whether the destroyed video would capture interactions, (2) whether the video would be useful, (3) whether police acted in bad faith, and (4) whether Mr. Hamilton had comparable evidence. Hamilton, slip op. at 6-7. But only the first of this list represents anything like a factual dispute; two through four are all legal arguments about the legal standard to be met, not factual disputes.

P.2d 289 (1999), for the proposition that appellate review is generally confined to evidence presented to the trial court. But that case involved a Social History offered for the first time on appeal as mitigation evidence to assist the Supreme Court in conducting now defunct proportionality review in a capital case. The court rejected the Social History because it pertained to information about tragic events in the lives of Mr. Elmore's neighbors and family members, which it deemed "not relevant to any issue" for proportionality review, given proportionality review's focus on the defendant's "*personal* characteristics." Id. at 302-03 (emphasis added). Here, as discussed, the trial transcripts were relevant to the issues raised at the hearing, which is why the trial transcripts repeatedly came up at the hearing as a proper object of the trial court's consideration. Unlike Elmore, where brand new material was submitted for the first time on appeal that did not even bear on the legal issue, the trial transcripts are part of the record available to the trial court

and were admittedly relevant to the issues the trial court was taking under consideration.

The state also relied on State v. Ward, 182 Wn. App. 574, 330 P.3d 203 (2014), to claim that Judge Lucas could not have relied on the 2014 trial testimony because it was testimony heard by a predecessor judge. Mot. to Modify at 3. Judge Lucas, however, was the first and only judge to consider Mr. Hamilton's Brady motion. The previous judge might have heard evidence that would become relevant to Mr. Hamilton's future Brady claim, but the Brady issue was not ever before her. Ward has no application because it does not involve Judge Lucas acting as a successor factfinding judge, as described in Ward, 182 Wn. App. at 583-84.

Several rules and authorities permit the consideration of the transcripts. RAP 9.10 grants authority to permit supplementation of the report of proceedings "[i]f the record is not sufficiently complete to permit a decision on the merits of the issues presented for review." It "pertains only to additions

to the record of *earlier trial court proceedings*." Harbison v. Garden Valley Outfitters, Inc., 69 Wn. App. 590, 593, 849 P.2d 669 (1993) (emphasis added). The 2014 trial transcripts are additions to the record, they contain portions of earlier trial court proceedings, and they pertain to the merits of the arguments raised by the parties on appeal. To fairly address the merits of the appeal, the transcripts should have been accepted and considered in the Court of Appeals. Conflicting with Harbison, the Court of Appeals decision merits RAP 13.4(b)(2) review.

In addition, it is difficult to understand why the Court of Appeals assumes that the factfinder—here a judge who explicitly acknowledged on the record his reliance on 2014 trial record—would not have access to the trial transcripts or that a fair decision on the merits of the Brady claim could be made without them. The Court of Appeals made the exact opposite assumption in State v. Bruno, noted at 9. Wn. App. 2d 1086,

2019 WL 3555078, at *2 (Aug. 5, 2019).[5] Mr. Bruno asserted that the resentencing judge gave inappropriate deference to the exceptional sentence imposed by a previous judge, arguing that the resentencing judge had not read trial transcripts or reviewed the evidence. Id. Much like in this case, the resentencing judge indicated she had access to the trial record but did not say how she had access or that she had in fact reviewed it. Id. Acknowledging that the resentencing judge "stated she did not hear the testimony, at no point did she suggest that she failed read the transcripts or familiarize herself with the facts produced at trial." Id. "Absent other evidence, we will not assume that a judge with access to the appropriate records failed to read them." Id. It seems that the Court of Appeals is willing to draw directly contradictory assumptions depending on the result it wishes to reach.

[5] Mr. Hamilton cites Bruno as nonbinding, unpublished authority pursuant to GR 14.1, which may be given whatever persuasive value deemed appropriate.

RAP 9.11 also allowed the Court of Appeals to direct that the trial transcripts be "taken" as "additional evidence," if "additional evidence" is really what transcripts from the same prosecution are. Six criteria must be met under RAP 9.11:

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a); Spokane Airports v. RMA, Inc., 149 Wn. App. 930, 936-37, 206 P.3d 364 (2009). These six requirements are addressed in turn.

First, the additional facts in the transcripts are needed to fairly resolve the issues on review—whether the undisputed facts found by the trial court are supported by substantial evidence.

Second, the additional evidence would not change the outcome of the decision being reviewed, but it would change the decision being reviewed by making the pertinent facts underlying that decision unassailable.

Third, it is equitable to excuse Mr. Hamilton's failure to present the transcripts to the trial court. The trial court indicated that it had access to the transcripts and referred to the testimony from Mr. Hamilton's 2014 trial as "testimony in the record." And the state did not complain about any of the defense's factual assertions in the trial court. Had the state done so, the defense likely would have presented the transcripts and other evidence necessary to assuage the state's concerns. It is therefore equitable to excuse the defense from not marking the trial transcripts as exhibits.

Fourth, the remedy available to Mr. Hamilton through postjudgment motions in the trial court is inadequate and unnecessarily expensive. Convening a hearing for the purpose of admitting transcripts from prior proceedings in this same

case is completely wasteful of time and resources, particularly where, as the record shows, the pertinent transcripts were readily available to anyone involved in this case, including the trial court.

Fifth, the remedy of granting a new trial is inadequate because no one is seeking a new trial. Considering transcripts the trial court had ready access to is an appropriate remedy.

Sixth, it would be inequitable to decide the case solely on evidence already taken in the trial court. As discussed above, to the extent the trial transcripts in this same prosecution are "evidence," Mr. Hamilton was not seeking to introduce extraneous evidence from an unrelated matter. He sought to supplement the record with a transcript from the very same case that is now on appeal. The trial court said it had the transcripts. There is no reason that the transcripts should not also be in front of the Court of Appeals. All RAP 9.11 criteria are satisfied.

And, even if each RAP 9.11 criterion were not technically satisfied, RAP 1.2 and RAP 18.8 allow the Court of Appeals to promote justice an facilitate a decision on the merits. Elmore, 139 Wn.2d at 302-03 (acknowledging RAP 9.11's requirements may be waived by the appellate court per RAP 1.2 and RAP 18.8). Given the ready availability of the transcripts to both the trial court and the Court of Appeals, given their usefulness in resolving the merits on appeal, and given that th Court of Appeals already had accepted the transcripts only to reject them for the first time in the merits opinion, the transcripts should have been considered by the Court of Appeals (or the Court of Appeals should have remanded for further factual hearings in the trial court).

Finally, ER 201 also empowered the Court of Appeals (or the trial court) to take judicial notice of adjudicative facts. In re Adoption of B.T., 150 Wn.2d 409, 414, 78 P.3d 634 (2003). A judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within

the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). Official court records such as are trial transcripts obviously meet this standard.

"A court of this state will take judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary, or supplementary to it." Swak v. Dep't of Labor & Indus., 40 Wn.2d 51, 53, 240 P.2d 560 (1952). This test is also met here, where testimony taken at Mr. Hamilton's 2014 trial is more than "engrafted, ancillary, or supplementary" to the superior court cause, it is part of the same superior court matter.

ER 201(f) states, "judicial notice may be taken at any stage of the proceeding." The Court of Appeals, just like the trial court, is permitted to take judicial notice of the official transcripts previously filed in this case.

In sum, there were multiple legal and factual reasons to consider portions of the 2014 trial transcripts on appeal. The Court of Appeals decision not to do so conflicts with Supreme Court and Court of Appeals cases that allow for meaningful supplementation of the record, meriting RAP 13.4(b)(1) and (2) review. Because the Court of Appeals decision to reject the transcripts—after it had already accepted them—came in the merits decision without notice to Mr. Hamilton or any opportunity for him to be heard and for counsel to consider the case without the transcripts, RAP 13.4(b)(3) and (4) review is also merited.

E. CONCLUSION

Because Mr. Hamilton satisfies every RAP 13.4(b) review criterion, this petition for review should be granted.

DATED this 18th day of February, 2022.

Per RAP 18.17(b), I certify this document contains 4215 words.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Appellant, v. JIMI JAMES HAMILTON, Respondent.	No. 80305-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Hamilton was charged with second degree assault of a corrections officer while he was incarcerated at Monroe Correctional Complex. Hamilton was convicted after presenting a mental-health defense at trial. Hamilton appealed and we remanded for a new trial. On remand, Hamilton moved to dismiss the case based on the State's failure to preserve surveillance video recordings of Hamilton's interactions from the morning of the assault. The court granted the motion and the State appealed. Because the deleted videos were not materially exculpatory and there is no evidence that the State acted in bad faith in failing to preserve the videos, we reverse and remand for a new trial.

FACTS

In August 2012, Hamilton was in the custody of the Washington State Department of Corrections as an inmate at the Monroe Correctional Complex. Around 10:00 AM on August 23, Hamilton had a conversation with Correctional Officer Nicholas Trout about filing an emergency grievance. The conversation became heated, and Officer Trout ordered Hamilton to return to his cell.

Hamilton began to comply and walk away, but then suddenly turned back and charged at Officer Trout, knocked him on to the floor, and began to punch him in the face.

After the assault, Hamilton told police that he had been feeling anxious about not being able to talk to a supervisor about his emergency grievance. Then, after he turned to walk back to his cell, he thought an inmate was trying to attack him with a knife, and he rushed forward and collided with the person. He told police that the next thing he remembered was someone yelling at him to stop.

Monroe Police Detective Barry Hatch led the investigation of the case and interviewed the defendant and other persons with whom the defendant had contact the morning before the assault. Hatch requested to preserve a portion of the prison's video surveillance, which showed Hamilton's movements and interactions leading up to the assault, the incident itself, and the moments after.

Hamilton was charged with one count of second degree assault. On September 18, 2012, Hamilton's counsel filed a notice of appearance and request for discovery, asking the prosecutor to "provide discovery as required by CrR 4.7(a)." Shortly thereafter, all of the prison's surveillance video from that day—other than the footage of the assault itself—was automatically overwritten as part of the system's routine functioning.

At trial, Hamilton asserted a defense of diminished capacity due to his mental health. In support of his defense, Hamilton testified and presented an expert psychiatric witness, Dr. Stuart Grassian, who testified to his opinion that

Hamilton suffered from mental illnesses related to his stay in solitary confinement at the time of the assault.

In October 2014, the jury found Hamilton guilty, and the court sentenced Hamilton to life without the possibility of parole based on his status as a persistent offender. Hamilton appealed, and in October 2016, we reversed his conviction based on improper cross examination of Dr. Grassian. State v. Hamilton, 196 Wn. App. 461, 465, 383 P.3d 1062 (2016). The appeal was mandated in May 2017, and the parties continued trial for several months.

In July 2019, two months before the second trial was set to begin, Hamilton moved to dismiss the assault charge. He contended that the State had violated his due process rights by failing to preserve the videos of his other interactions the morning of the assault. However, he did not attach any evidence to this motion, relying only on a summary of the facts. At the same time, Hamilton moved to suppress records from a search of his medical records. The State responded to the motions and attached the affidavit of probable cause to present the facts of the case. In his reply to the motion to dismiss, Hamilton did not attach any exhibits but did introduce certain evidence in the body of his brief. Specifically, Hamilton's counsel stated that Hamilton's expert had told him that the videos from that morning would have been "immensely helpful" in assessing Hamilton's mental health. To support his claim that the State had acted in bad faith, Hamilton's attorney described an e-mail from the prosecutor to the police department that stated, "This case has been assigned to Laura Twitchell. Go get em!!," and an e-mail between Department of Corrections officials that stated:

> "Per Detective Barry Hatch, handling the Criminal Investigation, the time need[s] to be stated in the narrative. Maybe you had a break in your typical schedule and were off by 5-10 minutes. . . Example: 'I got to work that day at 0730 hours . Approximately 5 minutes later as I began to distribute mail, I saw/heard . . .['] etc.)"

Hamilton's reply to the motion also included a sworn statement that "[t]he conversations and written materials referenced are relayed accurately."

The motions were heard by a different judge who had not presided over the original trial. Nonetheless, although no portions of the trial transcript were in the record before the court, both the State and the court referred to the trial testimony during the hearing.

On July 24, 2019, the court issued a letter ruling discussing the facts and its analysis and concluding that the charges should be dismissed. On August 1, the court entered an order of dismissal and stated that its analysis would be "further memorialized in written findings and conclusions entered at a later date." On August 6, the State appealed the decision to this court.

The trial court did not enter its findings and conclusions until November 15, 2019, and the State did not sign the order, indicating that it had not received notice of the findings. Hamilton filed the findings as supplemental clerk's papers on December 31. The State filed its opening brief on May 21, 2020. Hamilton filed his responding brief on April 13, 2021. Along with his brief, Hamilton moved to transfer reports of proceedings from his previous appeal to this appeal. The commissioner granted Hamilton's motion and we subsequently denied the State's motion to modify the ruling.

ANALYSIS

The State alleges that the court erred by dismissing the case, both because the deleted videos were not material exculpatory evidence and because the State did not exhibit bad faith. We agree.

Procedural Issues

The parties first raise several threshold procedural issues regarding the scope and standard of our review. These are addressed in turn.

1. Consideration of Trial Transcript

The State contends that although we granted Hamilton's motion to transfer the trial report of proceedings, we should not consider this transcript in making our determination because it was not before the trial court. We agree.

"We do not accept evidence on appeal that was not before the trial court." State v. Curtiss, 161 Wn. App. 673, 703, 250 P.3d 496 (2011); RAP 9.11. Here, the judge who heard the motion to dismiss did not preside over the 2014 trial. Neither party submitted any portions of the trial transcript in their briefing on the motion to dismiss. Nor is there any indication that the trial transcript was anywhere in the record before the trial court. The court did not identify what documents it had reviewed in reaching its decision, except to refer to the affidavit of probable cause and the "defense recitation of facts." While counsel for the State and for Hamilton both described trial testimony to the court, an assertion by counsel "does not itself constitute competent evidence." Lemond v. Dep't of Licensing, 143 Wn. App. 797, 807, 180 P.3d 829 (2008). Because there is no

indication that the trial transcript was before the trial court, we may not consider it.

Hamilton disagrees and contends that we should consider the trial transcript because the prosecutor invited the trial court to consider the transcript and the court did so. Although the prosecutor did encourage the court to look at the testimony from trial and the court made statements about what "the testimony in the record" established, this does not negate the fact that the transcript does not appear to actually have been before the court. The transcript that Hamilton asks us to consider is in the Court of Appeals file, not the superior court file. There is a presumption that "the trial judge did not consider inadmissible evidence in rendering the verdict," and there is no evidence in this case that the judge actually did search beyond the record before it to locate and read the trial transcript. State v. Read, 147 Wn.2d 238, 244, 53 P.3d 26 (2002). Accordingly, we do not consider the trial transcript on appeal.

2. Waiver of Challenge to Findings

Hamilton next contends that the State should not be permitted to challenge the trial court's findings because it "accepted the truth of each finding in the trial court."[1] However, the record does not support Hamilton's assertion. On the contrary, the State specifically challenged many of Hamilton's factual assertions, disagreeing that "video would have captured [Hamilton] and the interactions" that he had that morning, that any "video of 2-3 hours prior to the

[1] Hamilton specifically alleges that the State is barred from challenging the court's findings on the theories that it is judicially estopped, it invited any errors, and it waived its challenge.

assault would have been useful" to Hamilton, that "the police herein acted in bad faith," and that there was no comparable evidence available. Moreover, the court did not enter its findings until three months after the State appealed its order, entered the findings without notice to the State, and included findings that went beyond its original letter ruling.[2] Because Hamilton relies on a mischaracterization of the record, we reject his contention that the State is barred from challenging factual issues.

3. Standard of Review

Generally, "[w]e review findings of fact to determine whether they are supported by 'substantial evidence' and, in turn, whether the findings support the conclusions of law and judgment." State v. Boyer, 200 Wn. App. 7, 13, 401 P.3d 396 (2017) (quoting State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996)). "Substantial evidence is evidence sufficient to persuade a fair minded, rational individual that the finding is true." Boyer, 200 Wn. App. at 13. "We review allegations of constitutional violations de novo." State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

The State contends that we should review the court's findings de novo instead of for substantial evidence because the findings were based on documentary evidence and the State was not given notice of the entry of the findings. While the lack of notice to the State would normally require remand for

[2] For instance, while the court's letter ruling stated that Detective Hatch anticipated a mental health defense and that he interviewed every staff member who had contact with Hamilton on the morning of the assault, the formal findings specifically stated that Detective Hatch interviewed these staff members *because* he anticipated a mental health defense.

the proper entry of findings, remand in this case is not practicable because the judge who dismissed the case has since passed away. See State v. Nava, 177 Wn. App. 272, 289 n.6, 311 P.3d 83 (2013) (disregarding findings and conclusions entered without notice to appellate counsel and concluding that trial record was adequate for appeal); State v. I.N.A., 9 Wn. App. 2d 422, 427-28, 446 P.3d 175 (2019) (disregarding findings instead of remanding for proper entry because time was of the essence); In re Det. of G.D., 11 Wn. App. 2d 67, 71-72, 450 P.3d 668 (2019) (disregarding findings based on noncompliance with rules of appellate procedure and lack of notice to counsel). Because the trial record is adequate for our review, we disregard the court's findings and review the facts de novo.

Failure To Preserve Evidence

The State claims that the court erred by concluding that the State's failure to preserve video of Hamilton's conversations earlier in the day of the assault violated Hamilton's due process rights. We agree.

"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." State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). However, the State does not have "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). Accordingly, the State's failure to preserve evidence requires dismissal of the charges in two cases.

First, where the State fails to preserve "material exculpatory evidence," and second, where the destroyed evidence is only "potentially useful" but the State acted in bad faith in failing to preserve it. State v. Armstrong, 188 Wn.2d 333, 344-45, 394 P.3d 373 (2017). The trial court held that dismissal was required under both tests and we address each in turn.

1. Whether the Videos were Materially Exculpatory

The State contends that the trial court erred by concluding that the deleted videos were "material exculpatory evidence." We agree.

The Supreme Court has noted that the State's duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." California v. Trombetta, 467 U.S. 479, 488, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). To meet this standard for material exculpatory evidence, "the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Wittenbarger, 124 Wn.2d at 475. "Exculpate" means "to clear from alleged fault or guilt[, to] prove to be guiltless." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 794 (2002). By contrast, "potentially useful evidence" is "evidentiary material 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." Youngblood, 488 U.S. at 57.

In Wittenbarger, defendants who were charged with driving while under the influence of intoxicants challenged the State's failure to preserve detailed

inspection, repair, and maintenance records of the breath alcohol analysis machines used to calculate the defendants' blood alcohol content. 124 Wn.2d at 472-74. The defendants presented expert testimony that "*all* records of machine malfunctions and repairs would be useful and should be retained in order to assist the defense in challenging the reliability" of the machines. Wittenbarger, 124 Wn.2d at 474. Nonetheless, the Supreme Court held that the records were "not directly related to the accuracy of a particular breath test. Unlike the breath test ticket, which contains specific information regarding the accuracy of each . . . reading, evidence of past repairs is only tangentially related to whether the machine is properly functioning on a given day." Wittenbarger, 124 Wn.2d at 476. Furthermore, the court noted that the defendants had many alternative means to attack the credibility of the breath tests, including cross examination regarding operator error, expert testimony, and evidence of additional breath or blood tests. Wittenbarger, 124 Wn.2d at 476. Because the documents were "not directly related to the [defendants'] guilt or innocence" and the defendants had alternative means to attack the results, the documents did not constitute "material exculpatory evidence." Wittenbarger, 124 Wn.2d at 488.

Here, there is no evidence indicating that the deleted video was material exculpatory evidence. First, there is no evidence that the surveillance system captured all the interactions Hamilton had that morning, and even if it had, the video had no audio and might not have captured faces or body language clearly, if at all. Even if the video did clearly capture Hamilton's interactions, the video would not be material because as in Wittenbarger, the interactions "are not

directly related to [Hamilton's] guilt or innocence." 124 Wn.2d at 488. Hamilton's defense turned on his claim that he was in a "dissociative state—an altered [state] of consciousness—at the time of the assaultive act." Hamilton, 196 Wn. App. at 467. Even accepting Hamilton's claim that the deleted video would have shown Hamilton "undergoing a mental health episode, anxiety, paranoia, hallucination," this would not establish that Hamilton was in a dissociative state *at the time* of the assault. If a video could show this dissociative state, it would be the video of the assault, which was properly preserved and introduced into evidence.

Furthermore, and again accepting Hamilton's claim that the video would show him "undergoing a mental health episode, anxiety, paranoia, [and] hallucination," Hamilton had reasonable means to obtain evidence of a similar nature. Hamilton acknowledges that witness accounts were available and that many of these referred to Hamilton as being anxious, paranoid, and stressed that morning. Unlike the silent video recordings, these witnesses could describe the content of their conversations with Hamilton and their perception of his mental state. Therefore, as in Wittenbarger, Hamilton had many alternative means to present his defense, including cross examination, expert testimony, additional mental health exams, and video of the actual event during which Hamilton was purportedly in a dissociative state. 124 Wn.2d at 476.

Because the video did not possess an immediately apparent exculpatory value and other comparable evidence was available, it was not material exculpatory evidence.

2. Whether the State Exhibited Bad Faith

The State next contends that if the deleted videos were "potentially useful" evidence, the court erred by concluding that the State showed bad faith in failing to preserve the videos. We agree.

"'The presence or absence of bad faith . . . turn[s] on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" Armstrong, 188 Wn.2d at 345 (alterations in original) (quoting Cunningham v. City of Wenatchee, 345 F.3d 802, 812 (9th Cir. 2003)). "A plaintiff must 'put forward specific, nonconclusory factual allegations that establish improper motive.'" Armstrong, 188 Wn.2d at 345 (quoting Cunningham, 345 F.3d at 812). It is not enough to show that an investigation was incomplete or conducted negligently. Armstrong, 188 Wn.2d at 346. If the State dealt with the evidence in compliance with an established policy, the State acted in good faith. Armstrong, 188 Wn.2d at 345. The requirement that the defendant show bad faith confines the application of this rule to "cases where the interest of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." Youngblood, 488 U.S. at 58.

Here, there is no evidence in the record suggesting that the State knew that the videos of Hamilton's interactions from that morning would be exculpatory. The mere fact that Detective Hatch interviewed people with whom Hamilton interacted does not indicate that he thought videos of those interactions would be useful for Hamilton's case. Indeed, there is no evidence that Detective

Hatch's motivation in interviewing those individuals went beyond conducting a thorough investigation. Hatch's affidavit for a search warrant, which Hamilton submitted as evidence for his contemporaneously filed motion to suppress, indicates only that "numerous inmates witnessed the event. Several of those witnesses corroborate the events." Although Detective Hatch was aware of Hamilton's claims about his mental health and many months later requested a search warrant for Hamilton's medical and psychological records, there is no indication that he thought the videos of Hamilton's conversations would be relevant to a mental health defense. Hamilton has failed to put forward specific allegations that establish improper motive and has only, at worst, alleged an incomplete investigation. This is not sufficient to establish bad faith. Armstrong, 188 Wn.2d at 345-46.

Hamilton contends that the e-mails he submitted, including the encouragement from the prosecutor to "go get em!" and the e-mail encouraging a corrections officer to be precise about the time descriptions in his report, exhibited a lack of objectivity that constituted bad faith. Even if we were to read these e-mails as exhibiting a lack of objectivity in the investigation, the presence of bad faith turns on the State's knowledge of the exculpatory value of the evidence. Armstrong, 188 Wn.2d at 345. The e-mails do not mention the videos and have no bearing on this inquiry.

Finally, Hamilton contends that the State's failure to preserve the videos following the defense's discovery request establishes bad faith. However, the discovery request did not identify any specific material for the State to preserve,

but requested only "discovery as required by CrR 4.7(a)." CrR 4.7(a) requires the State to disclose "any electronic surveillance . . . of the defendant's premises or conversations to which the defendant was a party" that is "within the knowledge, possession, and control of members of the prosecuting attorney's staff." CrR 4.7(a)(2)(i), (a)(4). CrR 4.7(a) does not address material held by others, which the prosecutor must attempt to make available if the defendant specifically requests and designates such material pursuant to CrR 4.7(d). Accordingly, even reading the discovery request broadly, it did not ask the prosecutor to preserve the surveillance videos from earlier in the morning because they were not in the prosecutor's control at that time. If Hamilton had made a specific request for the specific videos from that morning under CrR 4.7(d) and the State had intentionally ignored it, this would be more indicative of improper motive on the State's part. As it is, there is no evidence establishing bad faith on the part of the State.

Because the surveillance videos were not material exculpatory evidence and there is no evidence that the State acted in bad faith in permitting the videos to be erased, we conclude that the State did not violate Hamilton's due process rights.

We reverse and remand for a new trial.

WE CONCUR:

APPENDIX B

FILED
1/19/2022
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON,

Appellant,

v.

JIMI JAMES HAMILTON,

Respondent.

No. 80305-1-I

ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Jimi James Hamilton has filed a motion for reconsideration of the opinion filed on November 22, 2021. Appellant State of Washington has filed an answer to respondent's motion. The panel has determined that respondent's motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is denied.

FOR THE COURT:

Judge

NIELSEN, BROMAN & KOCH, PLLC

February 18, 2022 - 3:38 PM

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