No. 101408-2

Court of Appeals No. 55608-1-II
Clark County Superior Ct. No. 19-1-03970-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff / Respondent,

v.

MICHAEL EVAN ROSS-MORALES,
Defendant / Petitioner.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO,
AND
THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
CLARK COUNTY

PETITION FOR REVIEW

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A. *IDENTITY OF PETITIONER AND DECISION BELOW*

Michael Ross-Morales, Petitioner, was the appellant below on direct review of criminal convictions. He asks the Court to grant review of a portion of the opinion issued by the Court of Appeals, Division Two, on September 27, 2022, in *State v. Ross-Morales*, __ Wn. App.2d ___ (2022 WL 4482754) (unpublished). A copy of the opinion is attached as Appendix A.

B. *ISSUE PRESENTED FOR REVIEW*

Did the State violate due process when it failed to preserve the material evidence of the car it claimed Mr. Ross-Morales was driving when it hit and ultimately killed the victim?

C. *STATEMENT OF THE CASE*

Petitioner Michael Ross-Morales was convicted after a jury trial before the Honorable Judge Bernard F. Veljacic in Clark County superior court with vehicular homicide, hit and run (death), and second-degree driving while license suspended. CP 192-93, 243-45; RCW 46.20.342(1)(a); RCW 46.52.020(4)(a); RCW 46.61.520(1).

The charges arose from the death of an elderly man, Michael Simmelink, who was using his walker and crossing a busy road outside a crosswalk on a slightly wet, dark evening when he was hit by a car, after which the driver did not stop. RP 423-25, 450-51, 454-56, 463-64, 518-21. Mr. Simmelink died 7 days later from his injuries. RP 423, 458-62, 741-42.

Mr. Simmelink had been seen by several witnesses crossing the same busy road against traffic and without the light, even outside the crosswalk, earlier that day. RP 521-64. Indeed, he had been found in the roadway with a broken leg after apparently having been hit by a car *the day before*. RP 768-69. Mr. Simmelink had checked himself out of the hospital the day of the incident against medical advice. RP 969-77.

One witness who interacted with Mr. Simmelink about an hour before this incident saw Mr. Simmelink in the road moving slowly and crossing against a light, so the witness ran into the street to physically block traffic to prevent Mr. Simmelink from getting hurt. RP 521, 555-63. That witness said Mr. Simmelink did not seem to be very aware of what he was doing and was not acting "normal." RP 521, 555-63.

When he was in the road waiting with Mr. Simmelink for medical help to arrive after the incident, that same witness noticed that Mr. Simmelink smelled heavily of alcohol and appeared very drunk. RP 521-65.

An expert who is nationally accredited in collision investigation calculated the car was going about 26 miles per hour at the time it hit Mr. Simmelink, although a local police officer opined it was 41-55 m.p.h. based on his view of some cell phone video. RP 874-76.

A Camas police officer found a vehicle with obvious recent windshield front passenger side and front end damage about four hours later and the owner, Dean Miesbauer, claimed he had loaned it to someone else that day, Michael Ross-Morales. RP 466-70, 652-57. Mr. Ross-Morales worked as a process server and had borrowed the car to go "serve" someone, together with his friend, Becca, that day. RP 618-23. He said that when they got out of the car to go knock on the relevant door, he had left the car running and a young man had jumped in and driven off with the car. RP 631-34, 798-99, 803.

Mr. Miesbauer confirmed that Mr. Ross-Morales had

called later that evening, saying the car had been stolen and asking for a ride. RP 631-34, 798-99. Mr. Miesbauer had driven with another man to go pick up Mr. Ross-Morales. RP 627-28, 794-95. That other man would later claim that Mr. Ross-Morales had asked him to tell police they had picked him up earlier than they had, but he had demurred. RP 804, 807.

Police talked to Mr. Ross-Morales that same night. RP 702. Because the car was believed to have been involved in the hit-and-run crime, it was impounded and towed to a secured, gated, 24/7 CCTV monitored facility. RP 667-82.

The incident occurred on September 30 and a warrant to search the car was executed by Washington State Patrol (WSP) on October 3. RP 742-44. A detective admitted the car was "an important piece of evidence[.]" RP 771-72. When the WSP crime lab team photographed and processed it, they took "swabs" from the front of the vehicle, the gearshift, the steering wheel and a spot under the driver's side seat belt. RP 747-52, 816-33.

But no samples were taken from the passenger seat belt, seat or door. RP 844-45. Nor did the WSP document the position of the driver's or passenger's seats. RP 837-38. The

owner of the car was short and drove with the seat all the way to the front with the seat back up, in contrast to the taller Mr. Ross-Morales. RP 628.

On October 4, the day after they searched the car, the police released it back to Mr. Miesbauer. RP 639-40. Mr. Simmelink had not yet died but was in serious condition in the hospital. RP 639-40. About an hour after getting the car back, Mr. Miesbauer was arrested on an unrelated incident and lost track of the car. RP 639-40.

Mr. Ross-Morales was arrested on May 23 of the next year. RP 746. During the 7 months the police waited to arrest Mr. Ross-Morales, they did not investigate anyone else as potentially having been the driver that night. RP 780.

Before trial, Mr. Ross-Morales moved to dismiss or to suppress the evidence from the car, based on the failure of the government to secure that material evidence. CP 32-40; RP 108-121. He noted the seat position and mirror position would have been incompatible with his height and would have shown he was not the driver but, because the State had released the car, it had deprived him of having his own expert examine that "[m]aterial, necessary" and "absolutely exculpatory" evidence.

RP 121.

Even though the State's entire case depended upon the car, the trial court ruled that the car only presented "speculative" and potentially exculpatory evidence which the government did not have to preserve. CP 146-50.

D. *ARGUMENT*

THE COURT OF APPEALS ERRED IN UPHOLDING THE DENIAL OF THE MOTION TO DISMISS AFTER THE GOVERNMENT FAILED TO PRESERVE THE MATERIAL EVIDENCE OF THE CAR USED TO COMMIT THE CRIMES, IN VIOLATION OF DUE PROCESS

This Court should grant review, because the Court of Appeals erroneously decided that Mr. Ross-Morales was not deprived of his state and federal due process rights even though the government failed to retain the car, which was material evidence against him.

Both the state and federal constitutions guarantee the due process right for the acused to have a meaningful opportunity to defend against the government's case. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); *California v. Trombetta*, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 81 L. Ed.2d 413 (1984); *see also*, *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). As a result, the

State is required to preserve material, exculpatory evidence. *See State v. Groth*, 163 Wn. App. 548, 557, 261 P.3d 183 (2011), *review denied*, 173 Wn.2d 1026 (2012). Dismissal is required if the State fails to preserve material exculpatory evidence or the police destroyed potentially useful evidence in bad faith. *See Wittenbarger*, 124 Wn.2d at 475.

It is not that due process imposes on police an "absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58. But the government must preserve material exculpatory evidence for examination and potential use by the defense. *Id.* Evidence is "material exculpatory evidence" when has an exculpatory value which was apparent and when the evidence is 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.

Here, the car met that definition. Indeed, it was the very instrument alleged to have been used to commit the crimes. And the police admitted knowing of the car's importance - that was why they impounded it in the first place.

In finding that there was no due process violation, the Court of Appeals held that the evidence "may have been helpful" but did not have "exculpatory value that was apparent before the car was released." App. A at 6. The Court held that the car was only merely "potentially useful evidence." App. A at 6.

This Court should grant review. In *State v. Armstrong*, 188 Wn.2d 333, 394 P.3d 373 (2017), the Court granted review to address whether due process was violated when police failed to collect video surveillance tapes after using those videos to question the accused at the scene. 188 Wn.2d at 344. This Court found there was no error in failing to collect what amounted to only "potentially useful evidence." 188 Wn.2d at 345. The Court distinguished between such evidence, however, and material exculpatory evidence, which possesses a potential exculpatory value which is apparent before the destruction of that evidence, and which is of such a nature that the defendant could not be able to use other reasonably available means to obtain evidence which was comparable. *Id*.

Here, the car was the very instrumentality of the crime. At the time the police released the car, they had already

decided that Mr. Ross-Morales was the suspect. Releasing the car when knowing that it had been used in a crime and that it would be used as evidence to prove guilt is akin to releasing a gun alleged to have been used to shoot someone without giving the defense the chance to have their expert conduct their own tests and do their own analysis.

In the discovery context, this Court has recognized that meaningful access to evidence supporting the charges is necessary in order to effectively prepare to present a defense. *See State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). The right to access to the evidence the state intends to rely on against you is a crucial part of due process rights including the right to a fair trial. *See id*. Indeed, it implicates the right to prepare to defend, if an expert is needed to examine the evidence in order to dispute the State's claims. *See id*.

This Court should grant review, should hold that the car used to commit the crimes was more than "potentially useful evidence" but instead was material and necessary, and should find that the destruction of that crucial evidence by the State violated due process. The convictions should thus be reversed.

E. *CONCLUSION*

Mr. Ross-Morales was deprived of his due process rights when the State failed to retain the crucial, material evidence of the car the State claimed Mr. Ross-Morales had used to commit the charged crimes. The Court of Appeals erred in holding otherwise. This Court should grant review.

DATED this 27th day of October, 2022.

ESTIMATED WORD COUNT: 1830

Respectfully submitted,

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Washington State
Court of Appeals
Division Two

September 27, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL EVAN ROSS-MORALES, Appellant.	No. 55608-1-II Consolidated with No. 55889-1-II No. 56168-9-II No. 56188-3-II No. 56308-8-II UNPUBLISHED OPINION
In the Matter of the Personal Restraint Petition of MICHAEL EVAN ROSS-MORALES, Petitioner.	

MAXA, J. – Michael Ross-Morales appeals his convictions of vehicular homicide and hit and run (death) and his sentence. His appeal has been consolidated with several personal restraint petitions (PRPs), in which he alleges that the trial court calculated his offender score incorrectly at sentencing. Ross-Morales also filed a statement of additional grounds (SAG).

These convictions arose from an incident in which Ross-Morales hit a pedestrian with a car he was driving and then left the scene. The car involved in the accident later was found abandoned. After the Washington State Patrol performed an extensive examination of the car, law enforcement returned the car to its owner and the car later could not be located. Ross-Morales argues that law enforcement's failure to retain the car as exculpatory evidence violated his due process rights.

We hold that (1) the trial court did not err in denying Ross-Morales's motion to dismiss based on law enforcement's failure to preserve the car involved in the hit and run; (2) we reject Ross-Morales's challenge to his convictions in his SAG; (3) as the State concedes, Ross-Morales is entitled to be resentenced because his offender score included four convictions for unlawful possession of a controlled substance that now are void under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021); and (4) we deny Ross-Morales's PRPs. Accordingly, we affirm Ross-Morales's convictions and deny his PRPs, but we remand to the trial court to adjust Ross-Morales's offender scores and for resentencing.

FACTS

Background

On September 30, 2018 at approximately 8:20 PM, Michael Simmelink began to cross a street in downtown Washougal outside of a crosswalk. He walked directly into the path of an oncoming car, which struck him. Simmelink later died from his injuries. The car that hit Simmelink left the scene. The car subsequently was found abandoned several blocks away.

Dean Miesbauer, who lived near Ross-Morales, owned the car involved in the hit and run. On the afternoon of the accident, Miesbauer allowed Ross-Morales to borrow that car so Ross-Morales could serve a process on a person named John Corcoran in Washougal. Ross-Morales arrived at Corcoran's house between 7:30 PM and 8:15 PM. Renee Corcoran told Ross-Morales that no one by that name lived there and said that he should leave. A short time later, Ross-Morales called a person named Dennis Simonson and asked Simonson to pick him up. Miesbauer came along so he could retrieve his car.

Sometime after 9:20 PM, Simonson and Miesbauer picked up Ross-Morales approximately 300 feet away from where Miesbauer's car had been abandoned. Ross-Morales looked disheveled and had cuts on his face. Ross-Morales told them that he had fallen into a

ditch with some blackberry bushes. He then informed Miesbauer that his car had been stolen. When Miesbauer asked if Ross-Morales called the police to report it, Ross-Morales said he had not and that Miesbauer should do it because it was his car.

When Ross-Morales later discovered that Simonson was going to talk with the police, he asked Simonson to tell them that he picked up Ross-Morales at 7:30 PM instead of the actual time. Simonson refused.

Inspection and Release of the Car

The Washougal police impounded Miesbauer's car. Pursuant to a warrant, the Washington State Patrol Crime Scene Response Team conducted an extensive investigation that involved an examination of the interior and exterior of the car for fingerprints, DNA, and other evidence. Investigators also took a large number of photographs.

The car then was released to Miesbauer pursuant to Washougal Police Department policy. But Miesbauer later went to prison on unrelated charges, and thereafter the car could not be located.

Law enforcement obtained the results of the search warrant examination several months later. The results showed that Ross-Morales's fingerprints were on the rearview mirror, Simmelink's blood was on the windshield, Ross-Morales's and Miesbauer's DNA was on the gear shift, and Ross-Morales's blood was on the driver's seat belt. After receiving these results, law enforcement arrested Ross-Morales, and he was charged with vehicular homicide, hit and run, and second degree driving with a suspended or revoked license.

Motion to Suppress

Before trial, Ross-Morales filed a motion to suppress evidence found in the car because the car was improperly returned to Miesbauer before Ross-Morales could inspect it. Ross-

Morales argued that the car was exculpatory evidence because the position of the seat, rearview mirror, and blood on the exterior and interior of the car would have demonstrated he was not the driver. The trial court denied the motion to suppress. The court concluded that this information was not apparently exculpatory.

Trial and Sentencing

The case proceeded to a jury trial. Several witnesses, including Ross-Morales, provided testimony at trial regarding the facts recited above. Ross-Morales also testified that he was working on Miesbauer's car the night before the accident and cut his hand. He used the seat belt to help him off the ground, and that is how the blood got on it. Ross-Morales was convicted of vehicular homicide and hit and run (death).

At sentencing, the State presented Ross-Morales's extensive criminal record, including his four prior convictions for unlawful possession of a controlled substance. Ross-Morales's criminal history also included two convictions in 2015 for felony malicious mischief: (1) deadly weapon and (2) hit and run attended vehicle. Ross-Morales's offender score was 12 for the vehicular homicide conviction and 13 for the hit and run conviction. Because of Ross-Morales's high offender score, the trial court imposed an exceptional sentence based on the "free crimes" aggravator under RCW 9.94A.535(2)(c).

Ross-Morales appeals his convictions and his sentence.

ANALYSIS

A. FAILURE TO PRESERVE EXCULPATORY EVIDENCE

Ross-Morales argues that the trial court erred in denying his motion to dismiss based on his claim that the State failed to preserve exculpatory evidence – the car used in the hit and run – in violation of his due process rights. We disagree.

1. Legal Principles

Whether the State's failure to preserve evidence of an offense constitutes a due process violation that requires dismissal of criminal charges depends on how the evidence is characterized. *See State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017). The criminal charges must be dismissed if the State has not preserved "material exculpatory evidence." *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). To constitute "material exculpatory evidence," the evidence at issue must " '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.' " *Armstrong*, 188 Wn.2d at 345 (quoting *Wittenbarger*, 124 Wn.2d at 475). This is a "very narrow category." *State v. Groth*, 163 Wn. App. 548, 557, 261 P.3d 183 (2011).

On the other hand, the failure to preserve "potentially useful evidence" does not violate due process unless the defendant can show bad faith by the State. *Armstrong*, 188 Wn.2d at 345. Evidence is merely potentially useful if " 'no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' " *Groth*, 163 Wn. App. at 557 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)).

Whether the State has acted in bad faith depends on the State's knowledge of the evidence's exculpatory value at the time it was lost or destroyed. *Armstrong*, 188 Wn.2d at 345. The defendant must come forward with specific factual allegations that show an improper motive. *Id.* However, "[a]cting in compliance with its established policy regarding the evidence at issue is determinative of the State's good faith." *Id.*

2. Analysis

Ross-Morales argues that the car involved in the accident constituted "material exculpatory evidence." He claims that an examination of the car would have shown blood underneath the car where he allegedly cut his hand the day before the accident and could have shown that the seat and the mirrors were not in the proper position for someone of his height.

However, while finding blood under the car and the position of the driver's seat and rearview mirror may have been helpful evidence, it did not have exculpatory value that was apparent before the car was released. The evidence that Ross-Morales hoped to recover from inspecting the vehicle would not have ruled out the fact that he was the driver. It was speculative at best and not apparently exculpatory. In addition, there were other reasonable means of obtaining this information because photos of the car were available. Ross-Morales could have had an expert testify to the position of the seat and mirror based on those photos. Therefore, we conclude that the car involved in the accident was not "material exculpatory evidence."

Instead, the car involved in the accident was merely "potentially useful evidence." The issue then becomes whether Ross-Morales can show that the Washougal Police Department released the car in bad faith. *Armstrong*, 188 Wn.2d at 345.

Ross-Morales does not present any specific factual allegations that show an improper motive. He only claims without supporting evidence that the police knew of the exculpatory value of the car at the time it was released. In addition, the car was released in accordance with Washougal Police Department policy, which is determinative of good faith. *Id.* Therefore, we conclude that the release of the car involved in the accident was not a due process violation.

We hold that the trial court did not err in denying the motion to suppress evidence from the car involved in the accident.

B. SAG CLAIMS

Ross-Morales makes four assertions in his SAG. We reject these assertions.

1. Failure to Preserve Exculpatory Evidence

Ross-Morales asserts that the trial court erred in denying his motion to dismiss because the State failed to preserve exculpatory evidence. We have addressed this issue above and do not address it again.

2. Sufficiency of the Evidence

Ross-Morales asserts that there was insufficient evidence showing that he was the driver of the car that hit Simmelink. We disagree.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id*. at 265-66. Credibility determinations are made by the trier of fact and are not subject to review. *Id.* at 266.

Here, Miesbauer testified that Ross-Morales borrowed his car before the accident. Ross-Morales was in Washougal in the car attempting to serve process shortly before the accident. His fingerprints were found on the rearview mirror, his DNA was found on the gear shift, and his blood was found on the driver's seat belt. When Simonson picked up Ross-Morales after the accident, he was 300 feet from where the car was abandoned and had cuts on his face, head and arm. Viewed in the light most favorable to the State, this evidence is sufficient for a jury to find beyond a reasonable doubt that Ross-Morales was driving the car when it hit Simmelink.

3. Application of Hit and Run Statute

Ross-Morales asserts that he cannot be guilty under RCW 46.52.020(4)(a), hit and run (death), because he asserts that Simmelink committed suicide by walking in the path of a vehicle and the statute only covers "accidents." We disagree.

RCW 46.52.020(1) provides, "A driver of any vehicle involved in an accident resulting in the injury to or death of any person or involving striking the body of a deceased person shall immediately stop such vehicle at the scene of such accident." The failure to stop "in the case of an accident resulting in death is guilty of a class B felony." RCW 46.52.020(4)(a).

Ross-Morales claims that Simmelink's intentional act of stepping in front of the car was not an "accident." However, an " 'accident' within the meaning of RCW 46.52.020(1) includes incidents arising from intentional conduct on the part of the defendant or the victim." *State v. Silva,* 106 Wn. App. 586, 595, 24 P.3d 477 (2001). Therefore, we reject Ross-Morales's claim.

4. Ineffective Assistance of Counsel

Ross-Morales asserts that he received ineffective assistance of counsel because his defense counsel did not show the jury the video of the accident that was slowed down, zoomed in, and lightened like counsel showed him. However, the record does not contain this interaction between Ross-Morales and defense counsel regarding the video. Accordingly, we cannot address this assertion because it is based on matters outside the record. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008); RAP 10.10(c).

C. ADJUSTED OFFENDER SCORE UNDER *BLAKE*

Ross-Morales argues, and the State concedes, that he is entitled to be resentenced because his offender score included four convictions for unlawful possession of a controlled substance that now are void under *Blake*. We agree.

In *Blake*, the Supreme Court held that Washington's strict liability drug possession statute, RCW 69.50.4013(1), was unconstitutional. 197 Wn.2d at 195. A conviction based on an unconstitutional statute cannot be included in a defendant's offender score. *State v. LaBounty*, 17 Wn. App. 2d 576, 581-82, 487 P.3d 221 (2021). Therefore, Ross-Morales's offender score must be adjusted to remove his four prior convictions for unlawful possession of a controlled substance.

In addition, the trial court imposed an exceptional sentence based on the "free crimes" aggravator because Ross-Morales's offender scores were 12 and 13. Because Ross-Morales's offender scores now will be 8 and 9, there no longer is a basis for the exceptional sentence.

Therefore, we remand for the trial court to adjust Ross-Morales's offender scores and to resentence him.[1]

D. PRP CLAIMS

Ross-Morales filed four PRPs that were consolidated into this appeal. All four PRPs claimed that Ross-Morales's offender score was calculated improperly with respect to a 2015 guilty plea. We disagree.

In the first three PRPs, Ross-Morales argues that in 2015 he took a plea deal to have his hit and run charge reduced to malicious mischief/deadly weapon, but two points were incorrectly added to his offender score regarding this guilty plea instead of one. In his fourth PRP, Ross-Morales concedes that he pleaded guilty to both hit and run and malicious mischief, but still asserts his offender score was incorrect.

[1] Ross-Morales also argues that the community custody supervision fees that the trial court imposed should be stricken. At resentencing, the trial court can consider whether to impose these fees.

In 2015, Ross-Morales originally was charged with felony hit and run. When he pleaded guilty, the charges were reduced to criminal mischief and hit and run (attended). The plea agreement states that Ross-Morales would plead guilty to those two offenses. No charges were dismissed. Therefore, two points were correctly added to his offender score based on the 2015 guilty plea.

Accordingly, we deny Ross-Morales's PRP.

CONCLUSION

We affirm Ross-Morales's convictions and deny his PRPs, but we remand to the trial court to adjust Ross-Morales's offender score and for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

WORSWICK, P.J.

PRICE, J.

RUSSELL SELK LAW OFFICE

October 27, 2022 - 9:07 AM

Transmittal Information

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