FILED
SUPREME COURT
STATE OF WASHINGTON
9/20/2023
BY ERIN L. LENNON
CLERK

FILED
Court of Appeals
Division II
State of Washington
9/20/2023 1:25 PM

Supreme Court No. 102406-1
Court of Appeals No. 56817-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDDIE HERSHELL WEST

Petitioner.

PETITION FOR REVIEW

PETER B. TILLER
Attorney for Petitioner
THE TILLER LAW FIRM
118 North Rock Street
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS **PAGE**

A. IDENTITY OF PETITIONER....................................1

B. DECISION OF COURT OF APPEALS 1

C. ISSUES PRESENTED FOR REVIEW.......................1

D. STATEMENT OF THE CASE 2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 13

1. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW WHERE WEST WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHERE INVESTIGATING OFFICERS FAILED TO COLLECT AND PRESERVE MATERIAL EXCULPATORY VIDEO EVIDENCE..13

F. CONCLUSION 25

TABLE OF AUTHORITIES

WASHINGTON CASES **Page**

State v. Armstrong, 188 Wn.2d 333, 394
P.3d 373 (2017) 14, 16
State v. Derri, 17 Wn.App.2d 376, 486 P.3d 901 (2021). 23
In re Electric Lightwave, Inc., 123 Wn.2d 530,
869 P.2d 1045 (1994) 23
In re Glasmann, 175 Wn.2d 696,286 P.3d 673 (2012) 26
State v. Groth, 163 Wn. App. 548, 261 P.3d 183 (2011) 19
State v. Koeller, 15 Wn. App. 2d 245, 477 P.3d 61 (2020) 16
State v. Wittenbarger, 124 Wn.2d 467, 880
P.2d 517 (1994) 16

UNITED STATES CASES **PAGE**

Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333,
102 L. Ed. 2d 281 (1988)..17, 19
Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194,
10 L. Ed. 2d 215 (1963) 16
Cunningham v. City of Wenatchee, 345 F.3d
802 (9th Cir. 2003) 24
United States v. Davenport, 519 F.3d 940 (9th Cir. 2008).........21
California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528,
81 L. Ed. 2d 413 (1984) 18

COURT RULES **Page**

RAP 13.4(b) 15
RAP 13.4(b)(1)...15
RAP 13.4(b)(2)...15

CONSTITUTIONAL PROVISIONS **Page**

U.S. Const. amend XIV 18
Wash. Const., article I, § 3...18

A. IDENTITY OF PETITIONER

Petitioner, Eddie West, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

West seeks review of the unpublished opinion of the Court of Appeals in cause number 56817-9-II (Slip op. August 22, 2023). A copy of the decision is attached as Appendix A at pages A-1 through A-15.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review where Mr. West was deprived of his state and federal due process rights when the police failed to "collect" exculpatory or potentially exculpatory video evidence of an incident during which Mr. West is alleged to have hit three officers who were investigating an unrelated shooting?

2. Should this Court accept review where— if the video evidence was not materially exculpatory and was instead potentially useful— was the failure to obtain and preserve the video of the

incident done in bad faith, in violation of Mr. West's state and federal due process rights?

D. STATEMENT OF THE CASE

Eddie West, Jr. was convicted in Pierce County Superior Court of three counts of third-degree assault following a melee in which police responded to an unrelated shooting at Latitude 84, a club in Tacoma. 2RP at 286. When police arrived, the scene outside the club was chaotic as people left the building and went into the parking lot. 2RP at 284. A large crowd gathered outside the club near the entrance, while others were rapidly leaving in cars. 2RP at 284, 291. A shooting victim was outside the club near the front entrance, the glass doors were open and a window was shattered and there was broken glass on the ground. 2RP at 288. Many people in the crowd were yelling abuse such as "f@ck the police," and also yelling "Black Lives Matter," and "defund the police." 3RP at 581. Officer Larry Breskin saw an individual he identified as Mr. West being confrontational with Officer Trent Dow and telling Officer Dow that he was going to "beat his ass." 2RP at 293, 360. Officer Breskin walked over to assist Officer

Dow. 2RP at 293, 295. Officer Breskin stated that he and other officers told Mr. West that it was a shooting scene and to walk away and that he was free to go. 2RP at 297, 329. Officer Breskin stated that Mr. West continued to be confrontational and that he continued to make "vague threats" that he was "going to beat us up." 2RP at 297. Officer Breskin stated that Mr. West walked away a few steps and then stopped and that Officer Breskin then used an "escort hold" on Mr. West by grabbing one hand above his elbow and one hand on his wrist to the control the subject and forcibly walk him away. 2RP at 300-01. Officer Breskin said that as he was doing this, Mr. West hit Officer Cenicola, who was assisting Officer Breskin. 2RP at 285. He stated that Mr. West tried to hit him and that he took him to the ground and that Mr. West hit him on the jaw with a closed fist and hit his ear. 2RP at 285,304, 305.

Tacoma police officer Steven Miller responded to Latitude 84 with a K 9 unit in his vehicle in the event that it was necessary to track the shooter from Latitude 84. 2RP at 374. Officer Miller testified that members of the crowd in the parking lot and those

still coming out of the Latitude 84 were hostile and shouting things like "bitch ass cop, motherf**king cops" and "all sorts of colorful metaphors to describe my profession and what we're supposed to be doing there." 2RP at 375. The shooting victim was receiving first aid and Officer Miller positioned himself between the crowd and the officers assisting the wounded man. 2RP at 377, 378. Officer Miller estimated that ten to fifteen Tacoma officers were on the scene. 2RP at 378,

Officer Miller "dispersed the crowd to a degree" and then saw Mr. West approaching in what he called "an aggressive manner as if he was trying to pick a fight." 2RP at 380. Officer Miller said that Mr. West said that he called him "a bitch ass cop, f*ck your shield, f*ck your badge." 2RP at 380. Officer Miller stated he used "de-escalation" techniques to move Mr. West out of the scene by saying "have a good night" and "enjoy your evening." 2RP at 382. Officer Miller stated that Mr. West moved toward Officer Dow and tried to pick a fight with him. 2RP at 382. Officer Miller said that he lost sight of Mr. West, and a few minutes later he saw Mr. West being taken out in an "escort hold"

by his wrist and elbow by Officer Cenicola to move Mr. West away from the shooting victim. 2RP at 383-84. Officer Miller stated that he saw Mr. West push Officer Cenicola then hit her in the center of her face with a closed fist. 2RP at 385. Officer Miller ran toward Mr. West and assisted the other officers in "taking Mr. West to the ground." 2RP at 387. While doing this Officer Miller stated that he was punched in the right side of his jaw and when he was on the ground Mr. West swung his arms and grabbed his vest dislodged two handgun magazines that were attached to his vest and was hit on the face when trying to secure Mr. West's hands. 2RP at 387-88. Officer Miller said that he attempted to hit Mr. West's face with a closed fist four times after Officer Miller was hit in the face. 2RP at 391. Officer Miller stated his fourth hit made a "good connection" and that Mr. West stopped flailing his arms. 2RP at 392, 401. Officer Miller was able to roll Mr. West over and put him in handcuffs. 2RP at 392. Officer Miller stated that after Mr. West was handcuffed and was being walked to a patrol car, he "attempted mule kicks against Officer Cenicola." 2RP at 396.

Officer Cenicola saw Mr. West moving toward Officer Dow and saying "I'm going to f*ck you up, I'm going to hit you in the face" 2RP at 435. A man who identified himself as "security" pulled Mr. West away from the crime scene area. 2RP at 437. She testified that two to three minutes later Mr. West came back to the area in front of the building and was making threats toward Officer Dow. 2RP at 443-47. Mr. West stepped back and then approached the officers again and Officer Breskin and Officer Cenicola grabbed Mr. West to move him out of the crime scene. 2RP at 450. Officer Cenicola stated that Mr. West pulled his arms free from the escort hold and punched her in the face with a closed fist. 2RP at 450-53. Officer Breskin took Mr. West to the ground assisted by Officer Cenicola and Officer Miller. 2RP at 455.

Officer Cenicola hit him in the face and delivered "knee strikes" to the side of his body. 2RP at 455. She saw him hit the side of Officer Breskin's face with a closed fist and said that Mr. West was flailing his arms with closed fists. 2RP at 456. She said the after being handcuffed and put on his feet, he started to kick

backwards toward her while she searched him. 2RP at 458. Officer Cenicola said that she had severe bruising across the top of her nose and under her eyes and had a bruise on the side of her leg where she was kicked. 2RP at 462.

Eddie West moved from Georgia to Tacoma in 2019. 3RP at 501. After getting off work on October 23, 2020, he went out to get a beer but two local stores that normally sold beer were closed due to Covid restrictions. 3RP at 504. He decided to go to Latitude 84, a place where he had not previously been, to play pool. 3RP at 504, 505. The pool tables were full so Mr. West drank and watched people play pool. 3RP at 504, 506. Mr. West heard gunshots from outside the building and then saw people scattering and running from the bar. 3RP at 508. He had brought a set of headphones but was wearing them around his neck at the time. 3RP at 509. After hearing gunshots Mr. West stayed in place where he was sitting because he did not want to get hit by a bullet if he ran outside where other people were running. 3RP at 509. After a while he went outside the club and a police officer said he needed to move because he was in a crime scene. 3RP at 511-12.

He moved to the opposite side to go find out which way he needed to go and then put his headphones back on his ears. 3RP at 512-14. While on the sidewalk he realized he was going the wrong way and so he went back the other way and an officer said that he could not walk through there. 3RP at 514. Mr. West told the officer that he was not from Washington and did not know the area, but he was wearing a mask as required under covid protocol, and the officer said "what? what?" 3RP at 514. He walked toward the officer to explain what he was saying and the officer told him that he needed to get off the sidewalk. 3RP at 514. He said that another officer came up and said "you need to get your black ass off here. You're obstructing the crime scene" and "get your black ass—just keep moving." 3RP at 514-15, 523. Mr. West took off his headphone and he "I know I didn't hear what I just heard" and the officer said "you need to get your ass—this is a crime scene. You need to get your ass and keep moving." 3RP at 515. Mr. West said that he did not expect to hear that in Washington and that "people are just different from the south." 3RP at 515. Mr. West said that he told the officer "I'm trying to figure out which way

because this officer down here told me to go this way. I stay down this way. So which way do I need to go to get out of you guys' way?" 3RP at 516. Mr. West said that he reached into his pocket to turn off his music and the officer grabbed his wrist and pushed him and then he was on the ground. 3RP at 519. He said that he fell backward and blanked out and reached out to try to break his fall. 3RP at 519. He said that while on the ground the officers were punching and hitting him, and he was struggling and fighting for his life. 3RP at 519. He testified that he then wondered if he was going die in Washington. 3RP at 518, 548.

Mr. West denied that he hit Officer Cenicola or the other officers. 3RP at 545. He denied hitting the other officers, stating that he was falling backwards and reaching to avoid falling straight on his back or his head. 3RP at 545-46. He said that he blacked out after falling backward. 3RP at 546, 547. He stated that he did not remember hitting any of the officers but that he was fearful for his life and thought he could die when the officers were piled on him. 3RP at 548, 551-52.

The court heard a defense motion to dismiss the charges

due to failure by the State to preserve video evidence of the incident. Officer Warner met with the Latitude 84 manager and was shown the video camera system in the bar. 1RP at 13-14. Officer Warner reviewed video of a group of three individuals including one with a gun and saw video of the male outside the bar on foot and firing a gun back into a crowd that had gathered outside. lRP at 16. Officer Warner made arrangements to obtain a copy of the portion of the video showing the initial argument and suspect in the shooting from multiple camera angles. 1RP at 20. Officer Warner said that there was a separate incident not related to the shooting that occurred during the investigation of the shooting. lRP at 21. While viewing the videos from multiple cameras, Officer Warner also saw an "interaction involving officers" on video and "a pile" of officers "in the corner of the camera." 1RP at 18. A separate incident number for the alleged assault against the officers was created. 1RP at 21-22. Officer Warner stated that Latitude 84 had cameras oriented to where the alleged assault had taken place. 1RP at 23.

Officer Warner said that he went outside Latitude 84 and

saw officers holding Mr. West and asked if they needed assistance. 1RP at 41, 44, 50. Mr. West stated that the officers were breathing hard after exertion and were knelling on Mr. West, who was handcuffed and on the ground. 1RP at 56-57.

Officer Warner located the video of the argument between patrons inside Latitude 84 and the ensuing shooting, which was exported onto a thumb drive and later collected by a Tacoma police officer. 1RP at 39, 40, 64, 65. Officer Warner did not collect or preserve the video of the alteration involving Mr. West, which occurred several minutes after the video of the shooting. 1RP at 44.

At the hearing, Mr. West stated that the defense had been trying for some time to obtain video of the incident to show what had really happened at Latitude 84 on that date, but had been unsuccessful in their efforts. 1RP at 90.

Defense counsel argued that the police had collected approximately eight minutes of video and failed to get an additional two minutes of video that occurred shortly after police arrived, that would have included the case involving Mr. West.

1RP at 93-94. The officer knew that someone had allegedly assaulted officers and saw someone being arrested as he walked out of Latitude 84 but failed to secure the video. 1RP at 94

The trial court judge stated that he found the video potentially exculpatory, but not sufficiently potentially exculpatory based on ***State v. Armstrong***.[1] 1RP at 112, 140-43. The judge stated: "I also found that the issue really turned upon the finding of bad faith. And essentially based upon that Armstrong defines as bad faith, whether I agree with it or not, that that bad faith, based upon the Armstrong precedent, was not present." 1RP at 140.

On appeal, Division 2 affirmed the convictions and (1) the trial court did not err in denying West's motion to dismiss for governmental misconduct, (2) West did not receive ineffective assistance of counsel where counsel did not request a missing evidence jury instruction, and (3) the prosecutor's statement referring to defense counsel as an "illusionist" does not rise to the level of prosecutorial misconduct requiring reversal. ***West***, slip

---

[1] 188 Wn.2d 333, 394 P.3d 373 (2017).

op., at *1, *14.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW WHERE WEST WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHERE INVESTIGATING OFFICERS FAILED TO COLLECT AND PRESERVE MATERIAL EXCULPATORY VIDEO EVIDENCE.

The trial court abused its discretion when it denied Mr. West's motion to dismiss the charges due to failure to obtain and preserve surveillance video of Mr. West on the sidewalk after he came out of the bar, the custodial "escort hold" of Mr. West by the officers, the alleged assault of Officer Cenicola and the pile of officers on Mr. West after he was forced to the ground.

"To protect a defendant's due process rights, the State has a

duty to preserve and disclose exculpatory evidence." ***State v. Koeller***, 15 Wn. App. 2d 245, 252, 477 P.3d 61 (2020) (citing ***State v. Wittenbarger***, 124 Wn.2d 467, 475, 880 P.2d 517 (1994)), review denied, 197 Wn.2d 1008, 484 P.3d 1263 (2021). To comport with due process, the prosecution has a duty to preserve material exculpatory evidence for use by the defense. ***Wittenbarger***, 124 Wn.2d at 475 (citing ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This duty extends only to material exculpatory evidence and to "potentially useful" evidence destroyed by the State in bad faith. Id. (quoting ***State v. Armstrong***, 188 Wn.2d 333, 345, 394 P.3d 373 (2017)).

Here, the Court of Appeals interprets the petitioner's argument as requiring the police to "collect" or obtain evidence that may be use useful to the defendant at some point in the future. ***West***, at *8. The petitioner respectfully submits that the Court overlooks the main point of his argument, which is not that the police are expected to serve as "investigators" on behalf of the defense, but instead that the police were required to obtain the several minutes of video of the alleged assaults which was within the police's control

and which was logically related to the assault involving the officers, as well as being potentially related to the shooting incident as well. The petitioner does not argue that the police were expected to comb through hours of video to find the assault video; the portion of the video in question was literally at Officer Warner's fingertips. Under the unique facts of this case, the Court's conclusion that "where the State never had possession of the evidence, it follows that there is no duty to preserve the evidence" and that the surveillance footage was in the possession of a third party is misreading of the facts—the officer had control of the video and authority to obtain the video in question, which is what the police did with the video pertaining directly to the shooting. ***West***, at *9.

"Under the Fourteenth Amendment to the federal constitution, criminal prosecutions must conform with prevailing notions of fundamental fairness, and criminal defendants must have a meaningful opportunity to present a complete defense." ***Armstrong***, 188 Wn.2d at 344. see ***Arizona v. Youngblood***, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); U.S. Const. amend. XIV; Const. art. I, § 3. This duty 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).

The first question under ***Armstrong*** is whether the evidence is "materially exculpatory" or only "potentially useful." "Materially exculpatory" evidence must "possess an exculpatory value that was apparent before it was destroyed." ***Armstrong***, 188 Wn.2d at 345; see ***California v. Trombetta***, supra. To meet this standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." ***Trombetta***, 467 U.S. at 489.

This duty, however, is not absolute. ***Wittenbarger***, 124 Wn.2d at 475 (observing that the United States Supreme Court "has been unwilling to 'impos[e] on the 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))). " '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.' " ***State v. Groth***, 163 Wn. App. 548, 557, 261 P.3d 183 (2011) (quoting ***Youngblood***, 488 U.S. at 57).

To establish that evidence constitutes material exculpatory evidence, "[a] showing that the evidence might have exonerated the defendant is not enough." ***Wittenbarger***, 124 Wn.2d at 475. Rather, "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." *Id.* (citing ***Trombetta***, 467 U.S. at 489).

The first prong of the ***Trombetta*** analysis---that the evidence possesses an apparent exculpatory value before it was destroyed---is satisfied here. The surveillance videotape evidence from the multiple Latitude 84 cameras had a material exculpatory value that was obvious from the inception of the incident. Officer Warner knew there was a fight involving multiple officers that had just occurred and knew an arrest had just taken place. Officer Warner testified that he heard the radio traffic regarding an altercation with someone in

front of Latitude 84 and that he heard the fracas, and that he saw a pile of officers on Mr. West and saw Mr. West was cuffed and the officers were breathing hard. Moreover, he knew that the arrest took place in an exceptionally politically charged atmosphere. Bar patrons were highly agitated and yelling abuse at the police and also yelling "Black Lives Matter" and "defund the police." It was entirely foreseeable that an arrest in that environment involving multiple officers would necessitate an investigation of the circumstances and cause of the incident and arrest, and that the person being arrested may have a legitimate reason to be fearful of the police. Moreover, it was entirely foreseeable that Mr. West would have a defense based on his fearfulness of the police and his fear that he would be seriously injured or even killed when he was forced to the ground by multiple officers.

Therefore, the materiality and exculpatory nature of the video in support of a defense based on actual or imminent danger of serious injury from an excessive use of force was plainly evident. The video evidence had an obvious exculpatory value at the time Officer Warner viewed the other video evidence of the shooting and directed

that the video be exported onto a disk or thumb drive and collected. The video would have shown the confrontation between the police and Mr. West, his interaction with police during the time leading to the incident, which he was given contradictory directions as how to leave the area, and the resulting "take down."

The State cannot reasonably argue that it was necessary to get only the video pertaining to the shooting in order to make a quick identification of a suspect in the shooting. The police did not get the thumb drive of the shooting video until several days after the incident, and obtaining the portion of the video pertaining to Mr. West would not have delayed identification of a suspect in the shooting or otherwise slowed the investigation of that crime.

The ability of a defendant to establish a defense to the crime by its very nature has exculpatory value. See ***United States v. Davenport***, 519 F.3d 940, 945 (9th Cir. 2008) ("Affirmative defenses are complete defenses that, once proven by the defendant, negate criminal liability for an offense, notwithstanding the government's ability otherwise to prove all elements of that offense beyond a reasonable doubt."). Here, where the evidentiary significance of the

video was overt and immediately recognizable, the government's duty is no longer undifferentiated and absolute, but specific and necessary.

As for the second ***Trombetta*** prong, Mr. West is unable to obtain evidence comparable to the video by any other means. ***Trombetta***, 467 U.S. at 489. As discussed above, the video evidence would have provided corroboration of Mr. West's testimony that he was fearful of the police and that he was grabbed by an officer and fell straight backward. Thus, it indeed would have assisted Mr. West to support the affirmative defense of use of force to resist arrest by being in actual or imminent danger of serious injury due to an officer's use of excessive force. Instruction 9; CP at 94. The video evidence was irreplaceable; Tacoma police officers did not have body cams at the time and Mr. West "would be unable to obtain comparable evidence by other reasonably available means." ***Armstrong***, 188 Wn.2d at 345.

The trial court cited ***Armstrong*** as insurmountable barrier to a finding that the video was material exculpatory evidence. Conclusion of Law 9. CP at 106. ***Armstrong***, however, is inapposite. In

Armstrong, the defense did not even attempt to establish the evidence in question had apparent exculpatory value; Armstrong asserted only that the video surveillance was "potentially useful evidence." 188 Wn.2d at 345. Courts may not rely on cases as controlling authority where those cases did not decide an issue. ***In re Electric Lightwave***, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

This case is also unlike ***State v. Derri***, 17 Wn.App.2d 376, 486 P.3d 901 (2021). In ***Derri***, police never tried to get surveillance video from a bank before the bank destroyed it, even though the police could have expected the bank to have surveillance video cameras that might be relevant to the case. ***Derri***, 17 Wn.App.2d at 409-10 . Here, Officer Warner viewed the video and had complete, unfettered access to all the video recorded that night but elected to obtain only a small portion of the available video.

Even if the video evidence was merely "potentially useful", the failure to obtain and preserve the video was in bad faith and therefore still requires dismissal. For "potentially useful" evidence, the failure to preserve evidence is not a due process error unless the accused can show bad faith by the government. ***Youngblood***, 488

U.S. at 58; ***Armstrong***, 188 Wn.2d at 345.

Whether the State acted in bad faith is a question of fact that a defendant must establish. ***Koeller***, 15 Wn. App. 2d at 253 (citing ***Armstrong***, 188 Wn.2d at 345). This is because " '[t]he 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 ... destroyed.' " ***Armstrong***, 188 Wn.2d at 345 (internal quotation marks omitted) (third alteration added) (quoting ***Cunningham v. City of Wenatchee***, 345 F.3d 802, 812 (9th Cir. 2003)). To establish bad faith, the defendant "must 'put forward specific, nonconclusory factual allegations that establish improper motive.' " *Id.* (quoting ***Cunningham***, 345 F.3d at 812). The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. ***Armstrong***, 188 Wn.2d at 345.

At the time of the investigation, Officer Warner was aware of the police activity and that fellow officers had performed a "take down" of Mr. West. As already discussed, Officer Warner had seen Mr. West when he entered Latitude 84 and was aware that the crowd

exiting Latitude 84 was hostile and was shouting anti police slogans and "Black Lives Matter." It was completely foreseeable from within minutes of the incident that the arrest was likely to be viewed through the lens of Black Lives Matter and the rapidly transforming societal treatment of African Americans and the extremely close scrutiny applied to police treatment of minorities during arrests, and that his treatment by police would be instrumental in a defense by Mr. West and also subject to judicial scrutiny. Moreover, the officer knew that the Latitude 84 entrance area was under constant video surveillance from multiple angles, which were fully functioning on the date in question. The officer obtained the portion of the video right up to several minutes before the incident involving Mr. West. Officer Warner had the ability to request, review, and preserve the digital video recordings but chose not to do so. Given that Officer Warner not only knew about but had viewed the video footage, and yet did nothing to preserve it, Mr. West established that the government's failure to preserve the potentially useful evidence qualified as bad faith.

The State acted in bad faith when it chose not to collect and

preserve video from Latitude 84. The video was useful and potentially exculpatory evidence. The State's conduct denied Mr. West a fundamentally fair opportunity to contest the evidence against him. The unpreserved portion of the video is materially exculpatory. Visual evidence can be more persuasive than testimony. Images may sway a jury in ways that words cannot. ***In re Pers. Restraint of Glasmann,*** 175 Wn.2d 696, 707, 286 P.3d 673 (2012). ***Glasmann*** addressed the impact of prejudicial images, but the inverse is true for visual evidence that that is probative and admissible. See e.g., ***Wegner v. Cliff Viessma Inc***. 153 F.R.D. 154, 159 (N.D. Iowa 1994) (surveillance video "by its nature, fixes information available at a particular time and place under particular conditions, and therefore cannot be duplicated.")

The court erred by failing to grant the motion to dismiss on the basis that the video was material exculpatory evidence, or alternatively, that the State engaged in bad faith by failing to collect and preserve the video of the altercation between Mr. West and the officers. Respectfully, the petitioner submits that the Court has overlooked the argument that the video was within the officer's

control and should logically have been collected as evidence as was done with the other video obtained by police.

F. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the convictions.

DATED: September 20, 2023.

Certification of Compliance with RAP 18.17:

This petition contains 4921 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

DATED: September 20, 2023.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835

CERTIFICATE OF SERVICE

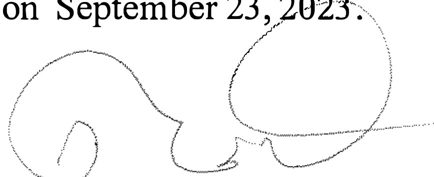
The undersigned certifies that on September 20, 2023, that this Petition for Review was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 909 A Street, Ste. 200, Tacoma, WA 98402, and to Kirstie Barham, Pierce County Prosecutor, and a copy was also emailed to the appellant at the following address:

Kirstie Barham
Pierce County Prosecutor's Office
Kirstie.barham@piercecountywa.gov

Mr. Eddie Hershell West Jr.
C/O Lisa Contris
Department of Assigned Counsel
lcontri@co.pierce.wa.us
LEGAL MAIL/SPECIAL MAIL

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
909 A Street, Ste.200
Tacoma, WA 98402-4454

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 23, 2023.



PETER B. TILLER-WSBA 20835
Attorney for Eddie Hershell West

Filed
Washington State
Court of Appeals
Division Two

August 22, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDDIE HERSHELL WEST JR., Appellant.	No. 56817-9-II UNPUBLISHED OPINION

CRUSER, J. — On October 23, 2020, police responded to a shooting outside a Tacoma bar. Subsequent to the shooting, Eddie Hershell West Jr. exited the bar and officers instructed West to leave the active crime scene. After walking away from the scene, West realized he was going the wrong direction and began walking back towards the scene. Officers again instructed West to walk away. After a verbal exchange, an officer placed West in an escort hold in an attempt to remove West from the scene. West broke free of the hold and punched several officers. Although the bar had surveillance cameras pointed in the direction of the incident, officers did not collect or preserve surveillance video evidence of the incident involving West. West was subsequently charged with three counts of third degree assault.

We hold that (1) the trial court did not err in denying West's motion to dismiss for governmental misconduct, (2) West did not receive ineffective assistance of counsel where counsel did not request a missing evidence jury instruction, and (3) the prosecutor's statement referring to

defense counsel as an "illusionist"[1] does not rise to the level of prosecutorial misconduct requiring reversal. Accordingly, we affirm West's conviction.

FACTS

1. *Background*[2]

On October 23, 2020, police responded to a shooting at a Tacoma bar. When police officers arrived at the bar, a large crowd of patrons were leaving the chaotic scene. Once on scene, officers found a gunshot victim outside the front door of the bar.

Eddie Hershell West Jr., a 46-year-old African American man, was at the bar that evening to play pool and have a couple of drinks after work.[3] After hearing the gunshot, West remained inside the bar while other patrons scattered. West exited the bar after 10 or 15 minutes. Multiple officers instructed West to walk away and stay out of the crime scene. West walked away, but when he realized he was walking in the wrong direction, he walked back towards the scene. Officer Trent Dow again instructed West to leave the scene. West attempted to explain that he was not from the area and was trying to figure out how to leave.

Officer Brynn Cenicola[4] observed West's interaction with Dow. Cenicola explained that initially, she thought West was just mumbling incoherently but that as West got closer to the officers she could more clearly hear him making threats. Cenicola attempted to deescalate the

[1] 4 Verbatim Report of Proceedings at 667.

[2] The following facts were compiled from testimony during West's jury trial.

[3] West had been drinking at home earlier in the evening.

[4] At the time of the incident, Officer Cenicola's last name was Cellan. Portions of the record refer to Cenicola as Cellan. This opinion reflects Cenicola's name following her name change.

situation. Cenicola instructed West to step back while officers helped the gunshot victim. Initially, West nodded and complied by taking a few steps back; however, after a moment's pause, West re-approached the officers.

After observing West's interaction with Dow, Officer Logan Breskin joined Cenicola in approaching West. Breskin and other officers repeatedly asked West to leave the scene but West reacted in a confrontational manner, vaguely stating he was going to "beat" the officers up. 2 Verbatim Report of Proceedings (VRP) at 297. Breskin's goal was to process the scene of the shooting and to remove West from the crime scene. Breskin ultimately grabbed West and used an "escort technique" to remove West from the scene. *Id.* at 300. While Breskin attempted to escort West from the scene, West pulled his arm free of Breskin, leaned back, turned and punched Cenicola in the face. West then tried to hit Breskin. Breskin, aided by Officer Steven Miller, pushed West to the ground.

Once on the ground, West struck Breskin and Miller. West struck Breskin with a closed fist, in the jaw and ear. West also repeatedly punched Miller in the head and jaw. Breskin explained that he responded with force, striking West "multiple times with [a] closed fist." *Id.* at 308. In an attempt to stop the assault, Miller punched West in the face several times. Cenicola also struck West in the face and in the side.

During the interaction, West described feelings of "fighting for [his] life." 3 VRP at 519. West could recall being pushed and falling straight back towards the ground. West remembered reaching out, and trying to brace himself by grabbing for whatever he could reach. Although West "blanked out" during the interaction with officers and could not recall punching the officers, West

acknowledged that he "probably was kicking." *Id.* at 518, 521. West stopped fighting officers after Miller "landed" a punch. 2 VRP at 392. Officers were then able to place West in handcuffs.

During the altercation in the parking lot between West and the officers, Officer Ryan Warner was inside viewing surveillance footage related to the shooting, which was the crime under investigation at that time. Warner was viewing the footage of the shooting to determine "who fired the gun, who's got the gun, and where [the suspect] was." 1 VRP at 15. While reviewing the live footage, Warner noticed that an altercation was occurring in the parking lot and also heard information about the altercation on his radio. Warner left the bar to assist the other officers involved in the altercation. Once the altercation was over, Warner returned to the bar to continue reviewing footage of the shooting. Because Warner was assigned to the shooting investigation, he only reviewed the footage of the shooting and not the altercation with West. The record contains no evidence that Warner believed, at the time he was viewing the footage, that West was going to be charged with a criminal offense.

The bar was unable to provide Tacoma police the video footage that night.[5] Detective James Buchanan was the detective assigned to investigate the shooting that occurred at the bar. When Buchanan reviewed the report prepared by Warner related to the surveillance footage, he realized the footage of the shooting had not been collected and he returned to the bar to collect the video. Buchanan retrieved only the footage related to the shooting and did not collect any footage related to the altercation between West and the officers.

---

[5] Warner testified that it was the bar's practice to burn a CD with the requested footage and provide it to the police at a later time.

West was charged with three counts of third degree assault against Cenicola, Breskin, and Miller.

2. *Motion to Dismiss*

Prior to trial, West moved to dismiss the charges against him. In his motion to dismiss, West argued that the State failed to "preserve, and/or produce, potentially exculpatory video surveillance evidence of which was in the state's control." Clerk's Papers (CP) at 21.

In its response to West's motion, the State argued that there was "no reason to believe that video surveillance of [the] incident would have been exculpatory" and that "based upon the multiple law enforcement witnesses and incident reports, any video surveillance [was] likely to have been inculpatory." *Id.* at 49. The State asserted that "[a]ny potential failure to collect the surveillance video showing the [incident] . . . was not done in bad faith." *Id.* at 54.

In explaining why he did not collect the video of the altercation, Warner testified that he was assigned to investigate the shooting, which was a separate investigation than what occurred with West in the parking lot. Warner further explained that the officers responsible for investigating the altercation with West were capable of obtaining the video. The footage of the incident was never produced to the trial court before it was apparently erased. The record does not show when the bar deleted videos of the incident or what the bar's retention policy required.

Prior to ruling on West's motion, the trial court explored West's attempts to secure the surveillance video. Defense counsel explained that attempts to secure the footage began within a month of West's case being charged.[6] Defense counsel further explained that the defense

[6] The State asserts that West first requested the videos in October 2021.

investigator tried to obtain the footage directly from the bar but the bar would not cooperate or return the investigator's call. During this same time period, defense counsel said she was having conversations with the prosecutor asking to be provided with the video. Defense counsel considered bringing a motion to compel, but instead filed a public records request for the video in April 2021. When defense counsel received the video in May 2021, she instantly discovered that it depicted only the shooting and not the incident involving West. Although the trial court asked whether the video footage had been deleted, defense counsel stated that she did not know. The trial court did not ask the State about the current status of the footage.[7]

The trial court concluded that the surveillance video was not material exculpatory evidence; however, it was potentially useful evidence. The trial court further concluded that although the Tacoma Police Department was negligent in failing to collect the surveillance video, West did not meet his burden in establishing that the police acted in bad faith. In the absence of a showing of bad faith, the trial court denied West's motion.

3. *The State's Closing Argument at Trial*

During closing argument, the prosecutor made the following argument to which West timely objected:

> [Defense counsel's] job is to get up there and offer a defense of her client, and she does that by being an illusionist. Her job is to get you to look at other things to distract you from what is actually going on here.

4 VRP at 667. The trial court sustained defense counsel's objection.

---

[7] Although it appears both the parties and the trial court assumed the footage had been deleted by the bar at some point prior to the hearing, the record is silent on the status of the footage. For purposes of this appeal, we note that nowhere in this record does anyone bearing personal knowledge of the matter say the video was destroyed. However, because this issue is not germane to our analysis, we accept the parties' assumption that the footage was destroyed.

After the jury retired for deliberations, the trial court further explained its reasoning in sustaining the objection, stating that caselaw makes "it very clear that disparaging opposing counsel or implying that an argument is slight [sic] of hand, which is exactly what was engaged in, is misconduct. As such, that is why [West's objection] was sustained." *Id.* at 676.

4. Verdict and Sentencing

In March 2022, a jury found West guilty of three counts of third degree assault. The trial court sentenced West to 30 days of confinement on each count to run concurrently using the first-time offender waiver pursuant to RCW 9.94A.650.[8] The trial court converted West's confinement to 240 hours of community restitution (service).

West appeals.

ANALYSIS

West argues that the trial court erred in denying his motion to dismiss for governmental misconduct. Central to his claim is that the Tacoma Police Department had a duty to obtain and preserve evidence, in this case surveillance video footage, that was created and held by a private party. West further argues that he received ineffective assistance of counsel where counsel failed to request a missing evidence jury instruction. Finally, West argues that the State's remarks during closing argument, referring to defense counsel as an "illusionist," amount to prosecutorial misconduct requiring reversal.

I. FAILURE TO OBTAIN EVIDENCE

[8] RCW 9.94A.650 was amended in 2022. *See* LAWS OF 2022, ch. 16, § 6. Because this amendment does not impact our analysis, we cite to the current version of the statute.

West argues that he was deprived of due process where the trial court "fail[ed] to grant the motion to dismiss on the basis that the video was material exculpatory evidence, or alternatively, that the State engaged in bad faith by failing to collect and preserve the video of the altercation between [West] and the officers." Br. of Appellant at 36. We disagree.

1. Legal Principles

Washington's "due process clause affords the same protection regarding a criminal defendant's right to discover potentially exculpatory evidence as does its federal counterpart." *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). Under the Fourteenth Amendment, a criminal defendant must be afforded "a meaningful opportunity to present a complete defense." *Id.* Accordingly, the State has a duty to disclose and preserve material exculpatory evidence in its possession. *Id.* at 475. The State has no duty, however, to *collect* exculpatory evidence. *See State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017). The police do 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.' " *Wittenbarger*, 124 Wn.2d at 475 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)).

We review "an alleged violation of the constitutional right to due process de novo." *State v. Johnston*, 143 Wn. App. 1, 11, 177 P.3d 1127 (2007).

2. Application

Here, West attempts to frame his argument as a preservation issue; however, such an argument fails because the State does not have a duty to collect evidence nor can it preserve evidence it never possessed. *See Armstrong*, 188 Wn.2d at 345. West cites no authority

establishing a duty to collect. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court . . . may assume that counsel, after diligent search, has found none"). Instead, our caselaw establishes that officers have no duty to search for exculpatory evidence or pursue every angle on a case. *Armstrong*, 188 Wn.2d at 345; *State v. Jones*, 26 Wn. App. 551, 554, 614 P.2d 190 (1980). Furthermore, where the State never had possession of the evidence, it follows that there is no duty to preserve the evidence. The surveillance footage was in the possession of a third party, and was never collected by the officers. In the absence of such a duty, West's claim necessarily fails.

II. Ineffective Assistance of Counsel

West argues that he received ineffective assistance of counsel where counsel failed to request a "missing evidence" jury instruction. Br. of Appellant at 36. West contends that "had the jury been so instructed, [West's] testimony that he did not hit the police but was instead grabbed by officers, fell backwards and flailed in an attempt to defend himself would have been strongly corroborated by the [adverse] inference" from the State's failure to produce the video. *Id.* at 41. We disagree.

1. Legal Principles

The United States Constitution and our state constitution guarantee a right to effective counsel at all stages of a criminal case. WASH. CONST. art. I, § 22; U.S. CONST. amend. VI. There is a strong presumption that counsel's assistance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was (1) deficient, and (2) resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is deficient

if it falls below an objective standard of reasonableness based on all the circumstances. *Id.* at 687-88. Prejudice ensues where there is a reasonable probability that the result of the proceeding would have differed had counsel not performed deficiently. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 36, 296 P.3d 872 (2013), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). If a defendant fails to show either prong of the ineffective assistance of counsel test, this court's inquiry need go no further. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Where an ineffective assistance of counsel claim "is based on counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." *State v. Classen*, 4 Wn. App. 2d 520, 539-40, 422 P.3d 489 (2018).

A defendant is entitled to a jury instruction that supports their theory of the case where "there is substantial evidence in the record supporting [that] theory." *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

"The missing evidence instruction derives from the missing witness doctrine." *State v. Derri*, 17 Wn. App. 2d 376, 404, 486 P.3d 901, *review granted in part*, 198 Wn.2d 1017, 497 P.3d 389 (2021), *aff'd but criticized*, 199 Wn.2d 658, 511 P.3d 1267 (2022). The instruction provides for a permissive inference that when evidence is within the control of a party " 'whose interest it would naturally be to produce it' " and the party fails to produce it, the jury may infer that the evidence would be unfavorable to the party. *Id.* (internal quotation marks omitted) (quoting *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991)). Under the closely related missing witness doctrine, a party is not entitled to a missing witness instruction where the witness is equally

available to both parties. *Blair*, 117 Wn.2d at 490. A missing evidence instruction "is not warranted when the evidence is unimportant or merely cumulative, or when its absence is satisfactorily explained." *Derri*, 17 Wn. App. 2d at 404.

2. Application

Here, West is unable to establish that he was entitled to a missing evidence jury instruction, and thus is unable to demonstrate prejudice. The missing evidence instruction applies where evidence " 'is within the *control* of a party whose interest it would naturally be to produce it.' " *Id.* (internal quotation marks omitted) (quoting *Blair*, 117 Wn.2d at 485-86). This evidence was never in the control of the State, and even if it was West has not shown that he did not have equal access to this evidence. Although West's counsel advised the trial court that the bar did not respond to their inquiries about the footage, the record does not reveal any attempt on counsel's part to issue a subpoena for production or otherwise seek the assistance of the court in obtaining this footage.[9] While it is true that the State viewed surveillance footage on the night of the incident that showed the altercation between West and the officers, the record does not show that the State was in control of this footage or that West did not have an equal opportunity to view or obtain it.

Because West was not entitled to a missing evidence instruction, he cannot show that one would have been given had it been requested. Moreover, he cannot show that the jury's verdict would have been different had the jury received such an instruction in light of the substantial evidence of his guilt presented to the jury. West's ineffective assistance of counsel claim fails.

III. PROSECUTORIAL MISCONDUCT

[9] *See* CrR 4.8(b).

West argues that the prosecutor's remarks during closing argument were improper and prejudicial. West contends that the prosecutor "disparaged defense counsel during rebuttal closing argument by" referring to defense counsel as an " 'illusionist' " whose " 'job is to get [the jury] to look at other things to distract [them] from what is actually going on here.' " Br. of Appellant at 43. West argues that because "there is a substantial likelihood serious misconduct impacted the result at trial, reversal is required." *Id.* at 45.

The State concedes that the prosecutor's comment was "arguably improper given that it could be interpreted as impugning the defense attorney." Br. of Resp't at 35. However, the State argues that West did not "meet his burden of demonstrating that the prosecutor's brief, isolated comment had a substantial likelihood of affecting the jury's verdicts."[10] *Id.* We agree.

1. Legal Principles

Under the Sixth and Fourteenth Amendments to the United States Constitution and under article I, section 22 of the Washington Constitution, a criminal defendant is guaranteed the right to a fair trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (plurality opinion). Prosecutorial misconduct threatens a defendant's constitutional right to a fair trial. *Id.* at 703-04.

---

[10] The State also argues that it is not enough for West to have simply lodged a timely objection to the prosecutor's remarks, but that he was also required to ask for a curative instruction in order to preserve this claim. The State provides no meaningful argument in support of its assertion of waiver and cites no authority in support of this contention. Rather, the State appears to rely on the portion of our analysis, in cases in which *no* objection is lodged, that examines whether a curative instruction could have obviated any prejudice caused by the improper remarks. It does not follow that a defendant must request a curative instruction in order to overcome waiver. Moreover, we have found no authority holding that a defendant must both timely object *and* formally request a curative instruction in order to preserve a prosecutorial misconduct claim for appeal.

To prevail on a claim of prosecutorial misconduct, West must show " 'that the prosecutor's conduct was both improper and prejudicial.' " *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). First, a defendant must show that the prosecutor's statements were improper. *Id.* Although a prosecutor enjoys wide latitude in making their closing arguments, it "is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." *Id.* at 448, 451.

Second, if the prosecutor's statements were improper, we must determine whether the statements were prejudicial. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). The standard of review employed to determine whether the defendant was prejudiced turns on whether the defendant objected to the prosecutor's statement at trial. *See id.* Where, as here, the defendant objected at trial, the defendant must establish that " 'there is a substantial likelihood the instances of misconduct affected the jury's verdict.' " *Id.* (internal quotation marks omitted) (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)).

In "reviewing a claim that prosecutorial misconduct requires reversal, the court should review the [prosecutor's] statements in the context of the entire case." *Thorgerson*, 172 Wn.2d at 443.

2. Application

Here, West objected to the prosecutor's argument, and the State concedes that the prosecutor's statement describing defense counsel as an "illusionist" were improper. We accept the State's concession on this point. By referring to defense counsel as an "illusionist" who was attempting to "distract" the jury, the prosecutor's statement exceeded the scope of acceptable

conduct. 4 VRP at 667. Similar to the prosecutor's statements in *Thorgerson*, the prosecutor's statement here carries implications of wrongful deception and dishonesty. 172 Wn.2d at 452.

Nonetheless, West does not meet his burden in demonstrating that the prosecutor's improper statement, when reviewed in the context of the entire case, was substantially likely to have affected the jury's verdict. The jury heard ample officer testimony concerning the injuries sustained as a result of their interaction with West. Cenicola described being "sucker punch[ed]" in the face. 2 VRP at 454. Breskin recounted being punched in the jaw and ear. And Miller described being "punched in the head a couple of times." *Id.* at 387. The jury also heard West's testimony corroborating that an altercation occurred in which West "blanked out" but recalled "struggling, fighting for [his] life." 3 VRP at 516-19. In light of the evidence presented to the jury, West has not demonstrated that the prosecutor's isolated statement during closing arguments was substantially likely to result in prejudice affecting the jury's verdict.

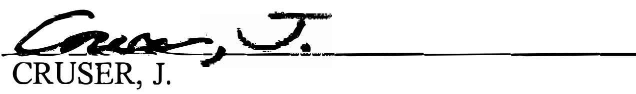
Accordingly, we conclude that, although improper, the prosecutor's statement does not rise to the level of prosecutorial misconduct requiring reversal or dismissal.

CONCLUSION

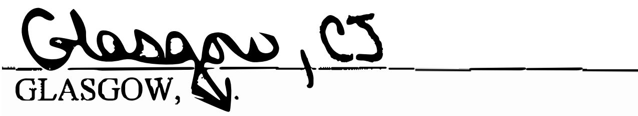
We hold that (1) the trial court did not err in denying West's motion to dismiss for governmental misconduct, (2) West did not receive ineffective assistance of counsel where counsel did not request a missing evidence jury instruction, and (3) the State's remark during closing argument referring to defense counsel as an "illusionist," while improper, does not amount to prosecutorial misconduct. Accordingly, we affirm West's conviction.

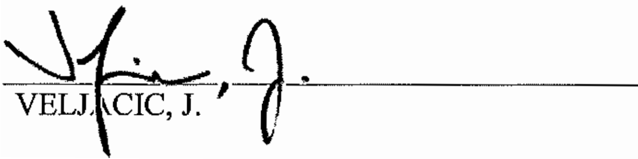
No. 56817-9-II

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.


CRUSER, J.

We concur:


GLASGOW, C.J.


VELJACIC, J.

THE TILLER LAW FIRM

September 20, 2023 - 1:25 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56817-9
Appellate Court Case Title:	State of Washington, Respondent v. Eddie Hershell West, Jr., Appellant
Superior Court Case Number:	20-1-02625-7

The following documents have been uploaded:

- 568179_Petition_for_Review_20230920132025D2687568_8353.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- andrew.yi@piercecountywa.gov
- pcpatcecf@piercecountywa.gov

Comments:

Sender Name: Kayla Paul - Email: kpaul@tillerlaw.com
Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: Kelder@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20230920132025D2687568