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No. 68725-5-I

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

LEONARD PEGS, JR.,
Defendant-Appellant.

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

The Honorable Janet E. Ellis, Judge

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

A. THE TRIAL COURT ERRED IN PERMITTING ANY OF THE WITNESSES TO OPINE THAT IT WAS PEGS WHO WAS DEPICTED IN THE STORE SECURITY VIDEO

The State does not dispute that, in this case, Pegs's burglary conviction hinged on whether or not he had entered the Toys 'R Us storeroom where video games were located. The only evidence that he entered the storeroom was the evidence on that security tape. Absent that evidence, the State could not prove that Pegs entered the store with the intent to commit a crime or that he entered any part of the store other than that open to the public.

The State fails to meaningfully address the decision in *State v. George*, 150 Wn. App. 110, 206 P.3d 697, *review denied*, 166 Wn.2d 1037, 217 P.3d 783 (2009). In fact, the State does not mention *George* even though it is directly applicable to the issues in this case. In that case, the appellate court concluded that the brief contact the officer had with the defendants fell far short of the kind of contact that would support a finding that the officer knew to express an opinion that they were the robbers shown on the very poor quality video. *Id.* at 117.

After determining that the Detective's identification testimony was improper, the *George* court then addressed whether the error was prejudicial. The court found that, as to appellant George, it was not;

> [The victim] identified George as the gunman in the robbery. George was driving the red van with the stolen television set. He initially failed to stop for the police and then, after the first stop, drove off again. He also fled on foot after exiting the van. Finally, Huynh described the gunman as a heavyset man; according to the booking information, George was 5'11" and weighed 280 pounds. We are satisfied that Rackley's improper testimony did not affect the jury's verdict.

George, 150 Wn. App. at 119-20.

However, the Court found that the error was not harmless as to Wahsise:

> [Other than the gunman, the victim] could not identify [any] of the men who took the television set. And no physical evidence linked Wahsise to the robbery. [A]ccording to the State, Wahsise fit the general physical description of one of the men who took the television . . . Finally, the other van occupants can be eliminated, according to the State, because at least one was a woman and the other men were so intoxicated they had difficulty exiting the van and walking. We conclude that this evidence is not sufficient for us to find Rackley's testimony harmless error as to Wahsise[.]

George, 150 Wn. App. at 120.

This case presents facts more egregious than those discussed in *Hardy*[1] and *George*. Here, none of the witnesses had ever seen Pegs before. Thus, they did not have sufficient experience to identify him from the videotape. Moreover, unlike *Hardy* and *George*, the videotape had

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[1] *State v. Hardy*, 76 Wn. App. 188, 884 P.2d 8 (1994), *review granted*, 126 Wn.2d 1008, 892 P.2d 1088 (1995), *affirmed by State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996).

been destroyed. Thus, defense counsel could not effectively cross-examine the witnesses regarding their identification of Pegs as the person who entered the storeroom.

B. THE STATE'S FAILURE TO PRESERVE MATERIAL EXCULPATORY EVIDENCE VIOLATED PEGS'S CONSTITUTIONAL RIGHT TO DUE PROCESS

Under the Fourteenth Amendment's due process clause, criminal prosecutions "must comport with prevailing notions of fundamental fairness," and a defendant must have a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Evidence is considered material if it possesses an exculpatory value that was apparent before the evidence was lost or destroyed and if the defendant would be unable to obtain comparable evidence if the evidence were destroyed. *Trombetta*, 467 U.S. at 489.

The State argues that "the chances are basically zero that the video surveillance recording would have been exculpatory." Brief of Respondent [BOR] at 13. But how can the State know that without viewing the video? The fact is that the exculpatory value of the evidence was immediately apparent to the store and the police. Clearly, Pegs was entitled to argue that he was not the person in the video. In this case, the State allowed the loss or destruction of the only evidence that Pegs had

committed a burglary. Pegs maintained his innocence. Thus, the only exculpatory evidence was gone.

If this Court concludes that the destroyed evidence was not demonstratively material exculpatory evidence, it must then review the trial court's conclusion that the State did not act in bad faith in destroying evidence potentially material to Pegs's defense. When potentially useful evidence is destroyed by the government, the defendant's right to due process is violated if the government acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d.281 (1988), *reh'g denied*, 488 U.S. 1051, 109 S.Ct. 885, 102 L.Ed.2d 1007 (1989).

Obviously, it is difficult for the accused to prove bad faith on the part of the government. *Id.* at 66-67 (Blackman, J., dissenting); *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992); Norman C. Bay, *Old Blood, Bad Blood and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 Wash. U.L.Rev. 241, 291-92 (2008). But the sheriff department's violation of its own protocols and directions from the investigating detectives is bad faith. Here, the State ignores the fact that the trial judge made a finding that the officer should have preserved the tape. Thus, even if the evidence was only potentially exculpatory, Pegs's right to due process was violated. The State also ignores the fact that its investigating officer made only one follow-up call to Toys 'R Us, waited

14 months to charge Pegs and had no other evidence that Pegs entered the off-limits area of the store. In fact, the State has no explanation for its shoddy investigation and delay. This is bad faith.

C. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE THE WITNESSES' TESTIMONY THAT WAS BASED SOLELY ON THE MISSING VIDEOTAPE

The best evidence rule provides that the original of a "writing, recording, or photograph" is required to prove the contents thereof. ER 1002. A writing or recording includes a "mechanical or electronic recording" or "other form of data compilation." ER 1001(1). Photographs include "still photographs, X-ray films, video tapes, and motion pictures." ER 1001(2). An original is the writing or recording itself, a negative or print of a photograph or, "[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately." ER 1001(3).

Where the rule applies, the proponent must produce the original (or a duplicate, *see* ER 1003) or explain its absence. ER 1002, 1004. The rule's application turns on "whether contents are sought to be proved." ER 1002. The rule does apply when a witness seeks to testify about the contents of a writing, recording or photograph without producing the physical item itself – particularly when the witness was not privy to the events those contents describe.

It is important to keep in mind that none of the witnesses who testified to the content of the videotape actually observed Pegs in the off-limits storage room. Similarly, none of them saw Pegs take the videogames. Thus, this is not a case where the witnesses actually saw events that were being simultaneously taped. Rather, the only evidence of the crime was on the missing video. Where a witness's testimony is the evidence at issue, the key to whether the rule applies is whether the witness has personal knowledge of the matter that exists independent of the recording. *See id.* If so, the evidence does not violate the rule. It is true that testimony that violates the rule is admissible if the recording is shown to be unavailable for some reason other than the loss or destruction of the originals by the proponent in bad faith. ER 1004(a). But, as argued above, the destruction here was a direct result of the officer failing to follow his department's guidelines for handling evidence. Moreover, he made only one attempt to get a copy of the video. For these reasons it was error for the trial court to permit the witnesses to testify about what they observed on the video.

D. THE TRIAL COURT ERRED IN FAILING TO GIVE THE PROPOSED JURY INSTRUCTION DEFINING "PROPERTY"

The definition of property was important because Gann found only an empty cardboard box inside the trunk and because the prosecutor

argued intent to steal the box alone was sufficient. Under these circumstances, the trial court erred by refusing to give the defense instruction defining property. "Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Failing to instruct on the defense theory is reversible error where there is evidence to support the theory. *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). Because the trial court refused to give the defense instruction, the jury did not know this and counsel's argument became meaningless.

There was evidence for a reasonable juror to conclude the box taken from the store had no value. Jorgensen testified that when they are emptied, the boxes are broken down, compacted, and discarded. 3RP 138-39, 174-75. Boxes are crushed at least daily, in an unlocked room near the compactor. 3RP 175-76. On "truck days," Jorgensen explained, the store receives upwards of 1,600 boxes. 3RP 138-39. Jorgensen routinely gave away empty boxes to customers upon request. *Id.*

There was also evidence to support a conclusion that Ballou and Pegs took nothing more than an empty box. The only evidence that Pegs filled the box with merchandise came from the storeroom surveillance

camera and resulting destroyed video. The absence of the video required the jury to take the word of the store employees and arresting officer as the true description of the video images. Under the circumstances, a reasonable juror would likely have been uncomfortable doing that.

Furthermore, the State's theory was that the defendants dumped the contents of the box before being stopped within minutes of driving out of Jorgensen's sight. 3RP 401. Yet no one attempted to look for the merchandise purportedly removed by Ballou and Pegs.

In addition, Gann drove his fully marked police car past Pegs's car in the opposite direction. 3RP 212, 217-18. Yet Pegs's car traveled normally and within the speed limit. 3RP 248. Gann turned around, activated his flashing lights, and caught up to the car. 3RP 218. Pegs responded appropriately by pulling over in the first available spot. 3RP 248-49. In short, Pegs drove in a manner suggesting he believed his conduct at the store was not improper.

There was, therefore, evidence to support Ballou's theory that there was no intent to take the property of another. The trial court erred by refusing to give the instruction defining "property."

Instructional errors are presumed prejudicial. *State v. Weaville*, 162 Wn. App. 801, 815, 256 P.3d 426, *review denied*, 173 Wn.2d 1004, 268 P.3d 942 (2011). To find an instructional error harmless, this Court

must conclude beyond a reasonable doubt that the verdict would have been the same without the error. *State v. Ponce*, 166 Wn. App. 409, 420, 269 P.3d 408 (2012).

The State provides no argument as to how it can overcome the presumption. The box was central to the case, as the prosecutor illustrated during closing argument. Nor is there any question it was taken: Jorgensen saw it leave the store and go into the trunk with his own eyes. A cardboard box certainly meets the common, dictionary definition of "property": "something that is or may be owned or possessed." Webster's Third New International Dictionary 1818 (1993). Once emptied, however, store personnel did not treat a box as having value. There was no evidence anyone paid anything for the compacted and discarded boxes. Indeed, Jorgensen routinely gave empty boxes away.

Given the rather unique nature of a standard cardboard box, this Court cannot say beyond a reasonable doubt that no reasonable juror would have concluded the empty box was property without value. The trial court's refusal to give the submitted definition of "property" was not harmless, and Pegs's conviction should be reversed.

E. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ENTER A SENTENCE PURSUANT TO THE FAMILY AND OFFENDER SENTENCING ALTERNATIVE

The trial court refused to impose a FOSA sentence for untenable reasons. The State does not dispute that her primary reason was that only 17 people had been granted such a sentence in Washington and that she was wrong about that "fact." And, despite finding that Pegs qualified, the State does not dispute that the judge read additional requirements into the statute including the requirement that Pegs's case be "extraordinary", Pegs be the only parent available to the child, and the notion that, in a co-defendant case, the sentencing alternative must be available to both defendants.

Nowhere did the Legislature state that the sentencing alternative be reserved to "extraordinary" cases. It is available to any offender who meets the criteria and is for the benefit of the children of the offenders who are the focal point of the program. In the trial court, the State failed to present any evidence that the children involved here would be better served by sending their father who loves them, cares for them and supports them – in particular by providing them with needed medical benefits – to prison. In fact, the State continues to focus on whether the FOSA would benefit Pegs rather than whether it would benefit his children. BOR 34.

II.
CONCLUSION

For the reasons stated above, this Court should reverse Pegs's conviction and remand for further proceedings. This Court should also find that the trial judge erred in failing to grant Pegs a FOSA sentence.

DATED this 30th day of May, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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