68915-1

68915-1

NO. 68915-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEAYN DUNYA,

Appellant.

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR**Error! Bookmark not defined.**.

1. Mr. Dunya was denied his right to a fair trial by jury when the prosecution ordered the consumption of a minute sample of DNA for the purpose of barring Mr. Dunya from observing or verifying the test.

2. The court erred by finding no bad faith when the prosecution ordered consumption of critical evidence contrary to its policy and practice.

3. The opinion testimony offered by police witnesses about the nature of images shown on a videotape invaded the province of the jury and denied Mr. Dunya a fair trial.

4. The videotaped reenactment of events by police officers was erroneously admitted because it was unreliable and more prejudicial than probative.

5. The court lacked authority to impose a firearm sentencing enhancement when it instructed the jury on the definition of a deadly weapon.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Fairness in the fact-finding process requires the prosecution to preserve evidence that appears to have exculpatory value. The

prosecution ordered the State Patrol Crime Lab to consume the only DNA obtained from the crime scene, knowing consumption would prevent any independent testing or verification. The prosecution issued this order even though the defense had requested advance notice of such testing and in violation of its own practice as well as the standard operating procedure of the State Patrol Crime Lab. Did the prosecution direct the consumption of DNA evidence in bad faith and undermine the fairness of the fact-finding process?

2. Unreliable evidence reenacting events, unnecessary opinions from police officers about the identity of the perpetrator, and improper assertions about the race of the suspect deny an accused person a fair trial if they are likely to affect the outcome of the case. Here, police officers gave their opinions on the identifying characteristics, including race, of the perpetrator, over objection and even though they had no firsthand knowledge of the suspect. Several police officers also wore a jacket like the suspect wore and mimicked his movements. Did the opinion testimony and reenactment evidence sway the jury on an improper basis?

3. The court lacks authority to impose a firearm enhancement when the jury has found only that the accused person possessed a

deadly weapon. The court instructed the jury to determine, by special verdict, whether Mr. Dunya possessed "a deadly weapon" based on the definition of a deadly weapon, but imposed two firearm sentencing enhancements. Did the court violate Mr. Dunya's right to a fair trial by jury when it imposed a punishment that the jury's verdict did not authorize?

C. STATEMENT OF THE CASE.

On July 5, 2011, a co-worker found Kristen Dunya inside her apartment. 5/23/12RP 46-47, 51.[1] She had been shot one time in the chest and likely died quickly from the wound. 5/23/12RP at146-47. Police Detective Les Gitts collected a yellow latex glove that was close to Ms. Dunya. 5/23/12RP 68. He did not find a gun, spent bullets, or any fingerprints of value inside the apartment. 5/23/12RP 78.

Two days later, Kara Buchanan called the police and said she shot Ms. Dunya. 5/23/12RP 85; 5/29/12RP 202. Ms. Dunya was in the process of divorcing Keayn Dunya, who was now Ms. Buchanan's boyfriend. 5/30/12RP 250-51, 400, 402. Ms. Buchanan told the police details of the shooting that had not been released publicly and only the

investigators knew. 5/23/12RP 85. She also said she was committing suicide. *Id.* Police officers found her on the beach, bleeding heavily from cuts on both her wrists. 5/23/12RP 87. She had a pill container for acetaminophen hydrocodone, which was the same type of pill found at the crime scene. 5/23/12RP 90. After her wounds were treated at the hospital, Ms. Buchanan was charged with first degree murder. CP 1; 5/30/12RP 356.

The police also charged Mr. Dunya with first degree murder. CP 1. They obtained video images from surveillance cameras near Ms. Dunya's apartment. 5/23/12RP 158, 165. The cameras showed a person wearing a hooded jacket with stripes on the sleeves, carrying a long object, going in and out of Ms. Dunya's apartment in the early morning of July 3, 2011. 5/23/12RP 168, 171. A similar jacket was found in Ms. Buchanan's car. 5/23/12RP 105-06; 5/29/12RP 57-58. The jacket was size extra-large and belonged to Ms. Dunya. 5/23/12RP 106; 5/30/12RP 266. Ms. Buchanan was about 5'3" tall and heavy, while Mr. Dunya was about 5'10" tall. 5/29/12RP 67-68; 5/30/12RP 267. The cameras showed a car similar to one Ms. Buchanan owned parked near Ms.

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[1] The verbatim report of proceedings are referred to by date of the court hearing.There are two volumes from 5/21/12, after the court reporter corrected

Dunya's apartment and this person in the hooded jacket was the only person in the car. 5/23/12RP 103.

After Mr. Dunya and Ms. Buchanan were arrested, both filed written requests that the prosecution provide notice prior to any testing or destruction of evidence. Supp. CP _, sub. no. 9; Whatcom Co. No. 11-1-00803-0 (Supp. CP _, sub. no. 5A). Ms. Buchanan's request was filed July 12, 2011, and Mr. Dunya's similarly worded request was filed July 14, 2011.

In a telephone call on July 28, 2011, and an email sent on August 1, 2011, forensic scientist Mariah Low from the Washington State Patrol Crime Laboratory informed the lead detective in the case that she had obtained a minute sample of biological matter from the latex glove found near Ms. Dunya's body. 5/29/12RP 165. She believed she could extract a DNA profile from the material but because the sample was so small, her test would consume the sample. CP 105. She asked for permission to consume the available DNA. 5/29/12RP 165; CP 105. Prosecutor David McEachran sent a written response dated September 7, 2011, authorizing Ms. Low to consume the DNA material. CP 106.

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and replaced the original volume. The pertinent volume is noted in the citation.

But the prosecutor did not inform the defense of Ms. Low's letter or that he had authorized the consumption of the DNA. CP 103. Mr. Dunya did not learn that the DNA test had been performed until after the evidence was destroyed. *Id.* Contrary to proper protocol, Ms. Low tested both the glove and a known sample of Mr. Dunya's DNA, which had been stored in the same evidence bag as the glove. 5/29/12RP 155, 169; 6/4/12RP 472, 478-79. Ms. Low concluded that the glove contained a mixed sample of DNA from at least two people and Mr. Dunya's DNA profile matched the profile of the major contributor to this sample. 5/29/12RP 146.

Mr. Dunya brought a motion to suppress the DNA evidence based on the prosecution's purposeful consumption of the DNA evidence despite defense requests for notice about any such testing. CP 102-34. An expert in DNA explained the importance of independent observation and testing of DNA. CP 107-12. The court denied the motion to suppress. 5/21/12(vol. 1)RP 76-77.

The prosecution arranged a plea bargain with Ms. Buchanan in exchange for her testimony against Mr. Dunya. She pled guilty to rendering criminal assistance in the first degree. 5/30/12RP 247. Contrary to her confession to police, Ms. Buchanan denied being

involved in causing Ms. Dunya's death. 5/30/12RP 249. She said Mr. Dunya and his son Kai spent the July 4th holiday weekend at her home on Whidbey Island. 5/30/12RP 257. She woke up early on Sunday, July 3rd, and noticed Mr. Dunya was not in bed but his cell phone was on the nightstand. 5/30/12RP 261. She read the text messages on his phone, some from other women, and thought he was seeing someone else. 5/30/12RP 261, 264. When he returned, he did laundry, including a red jacket, and had a plastic bucket with him that he took to a burn pile outside. 5/30/12RP 266, 270. The rest of the day was "perfect," playing croquet and watching fireworks. 5/30/12RP 274. When a police officer called her on July 5th, she told him that Mr. Dunya had spent the weekend with her, without mentioning that he may have left in the middle of the night.5/30/12RP RP 286, 296-97.

Ms. Buchanan said that she confessed to killing Ms. Dunya because she was upset over the idea that he was having an affair and did not want Mr. Dunya's son Kai to lose his father. 5/30/12RP 290, 294. She felt she "had let Keayn down." 5/30/12RP 349. When she realized their relationship was "beyond repair" she "did the only thing I could, I set the stage to take the blame" for causing Ms. Dunya's death. 5/30/12RP 349-50. She sent text messages to Mr. Dunya, saying she

was sorry, and to her family, saying she did not want to put them through a trial. 5/30/12RP 350-51.

Mr. Dunya was convicted of first degree murder while armed with a deadly weapon. CP 37; 38. He received a standard range sentence and a firearm sentencing enhancement. CP 6-7.

Relevant facts are discussed in further detail in the pertinent argument sections below.

D. ARGUMENT.

1. **The State's deliberate consumption of the only DNA evidence from the crime scene without notice to Mr. Dunya, despite Mr. Dunya's request to be notified, denied him a fair trial.**

a. *The prosecution may not secretively endorse the destruction of significant evidence during pretrial proceedings.*

The integrity of the fact-finding process is at the heart of the right to a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 21, 22. Courts zealously guard against evidentiary restrictions or governmental actions that call into question the fairness of the accused's ability to defend against the State's charges. *Darden*, 145

Wn.2d at 620; *see State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.3d (1984) ("We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability").

Accused persons have "constitutionally guaranteed access to evidence" based on the right to fairly defend oneself. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2538, 73 L.Ed.2d 413 (1984). If evidence is material and exculpatory, the constitution requires the prosecution to disclose it to the defense even if the defense did not request it and the prosecutor assigned to the case did not know about it. *Brady v. Maryland*, 373 U.S 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). If evidence is material and potentially useful, but not inherently exculpatory, the prosecutor may not hide it or order its destruction in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

Evidence that "might be expected to play a significant role in the suspect's defense" must be preserved because such evidence has evidentiary value that is apparent before its destruction and the defense cannot obtain comparable evidence by other reasonably available means. *Trombetta*, 467 U.S. at 488-89. *Trombetta* involved two cases where men arrested for drunken driving complained that the police had

not *sua sponte* preserved their post-arrest breath samples that were used to measure whether they were under the influence of alcohol. *Id.* at 482. The police, "acting in accord with their normal practice," had destroyed the breath samples after testing them. *Id.* at 488. The defendants claimed that the state's failure to preserve their breath samples violated their due process right to challenge the prosecution's evidence. *Id.* at 483.

The *Trombetta* Court found that the prosecution's duty to preserve evidence from destruction applies to "evidence that might be expected to play a significant role in the suspect's defense." *Id.* at 488. The breath samples at issue in *Trombetta* did not meet this threshold.

The court reasoned that "the chances are extremely low that preserved samples would have been exculpatory"; and the mechanism for testing these samples had a high degree of accuracy. *Id.* at 489. A malfunction in the machine used would be apparent and could be assessed by the defense at a later date. *Id.* Because the defense retained the ability to challenge the state's evidence, the due process clause did not mandate a sweeping rule requiring preservation of potentially useful evidence gathered by the state. *Id.* Unlike the breath test in *Trombetta*, DNA evidence "might be expected to play a significant role in the

suspect's defense," and comparable evidence cannot be reasonably obtained once a sample is consumed. *See Trombetta*, 467 U.S. at 488–89.

When the prosecution has an affirmative duty to preserve evidence, it may not encourage its destruction. *Freeman v. State*, 121 So.3d 888, 895, *reh'g denied* (Miss. 2013). In *Freeman*, the court ordered the prosecution to preserve a videotape of a police officer arresting a DUI suspect but it was destroyed. *Id.* Unlike *Trombetta*, where the defendants had not filed motions to preserve the evidence in advance of trial, Mr. Freeman specifically requested the preservation of evidence prior to its destruction. *Trombetta*, 467 U.S. at 482, 488; *Freeman*, 121 So.3d at 895. Based on Mr. Freeman's request and the court's order, the evidence's preservation was not subject to guesswork and did not place unreasonable discovery demands on the prosecution, particularly when it was relatively easy to preserve the evidence. *Id.* at 896. Because the prosecution "inconceivably ignore[d]" a discovery request and its affirmative duty to preserve evidence, its conduct violated due process. *Id.* at 896.

Due process also requires that trial proceedings must not only be fair, they must "appear fair to all who observe them." *Wheat v. United*

States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A prosecutor's role is not to win a case, but to see that justice is done. *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Misconduct by the state violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady,* 373 U.S. at 87.

In the case at bar, the prosecution authorized the consumption of a minute sample of DNA evidence taken from the crime scene despite Mr. Dunya's written request for notice before any such evidence or potential evidence was tested, released or destroyed by the State. CP 106; Supp. CP _; sub. no. 9.[2] The state had obtained 0.102 nanograms of material containing DNA from a glove at the crime scene. 5/29/12RP 181. One nanogram is 0.0000000001 gram, or one-billionth of one

[2] Kara Buchanan, who was charged along with Mr. Dunya as his co-defendant throughout the pretrial stages of the case, filed an identical request two days before Mr. Dunya's discovery demand. Whatcom Co. No. 11-1-00803-0 (Supp. CP _, sub. no. 5A, filed July 12, 2011).

gram.[3] Due to the prosecutor's authorization of consumption, the forensic scientist used the entirety of the sample in her testing and no independent verification was possible.

Unlike *Trombetta*, Mr. Dunya timely requested preservation and notice before the evidence was tested but this advance request was ignored by the prosecution. Due to the nature of the evidence and the stage of proceedings at which the State disregarded Mr. Dunya's request to be notified of the testing, the State's actions undermine the fundamental fairness at the core of the right to due process of law.

b. *Consuming DNA without permitting the defense the opportunity to observe the DNA test is contrary to established practice*

DNA evidence carries a perception of infallibility among jurors or judges but "the accuracy of the test results are largely dependent on the methods used by the analyst." W. Thompson, et al, "Forensic DNA Statistics: Still Controversial in Some Cases," The Champion, at 22 (Dec. 2012); Brief of Innocence Network as Amicus Curiae, *Williams v. Illinois*, U.S. Supreme Court No. 10-8505, at 6 (filed Sept. 7, 2011).[4]

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[3] *See* Wikianswers, available at: http://wiki.answers.com/Q/How_much_is_a_nanogram (last viewed Nov. 21, 2013),

[4] Available at:

Unvalidated or improper forensic science is a leading cause of wrongful convictions. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319, 129 S. Ct. 2527, 2537, 174 L. Ed. 2d 314 (2009); *see* Innocence Project, Forensic Oversight, available at: http://www.innocenceproject.org/fix/Crime-Lab-Oversight.php (last viewed Nov. 14, 2013).

The America Bar Associations Standards for Criminal Justice: DNA Evidence, 3d ed. (2007) dictate that a laboratory should not consume DNA evidence without prior approval of the prosecution and the defense if a person has been charged, particularly when the testing will consume the DNA evidence. ABA Standard 3.4(b), (c). ABA Standard 3.4(c) states:

> Before approving a test that entirely consumes DNA evidence or the extract from it, the prosecutor should provide any defendant against whom an accusatorial instrument has been filed, or any suspect who has requested prior notice, an opportunity to object and more for an appropriate court order.

The Washington State Patrol Crime Lab's written protocol and standard operating procedure adheres to the ABA Standards and requires

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http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-8505_petitioneramcuinnocencenetw.authcheckdam.pdf (last viewed Nov. 21, 2013).

permission from the pertinent law enforcement authority prior to DNA testing that will consume more than half of the biological sample. 5/29/12RP 161. The State Patrol Crime Lab's protocol is predicated on the understanding that the prosecution will notify the defense. *Id.* at 160-61.

Consumption that precludes corroboration of test results is significant because there are many steps in DNA analysis and "errors can occur during each stage." Brief of Innocence Network at 7 (citing numerous examples of "simple human errors"). The reliability of DNA evidence is "subject to the problems of human error and misconduct." *Id.* at 13. DNA must be extracted from a biological sample and this process is "more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 82, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009) (Alito, J., concurring, quoting J. Butler, *Forensic DNA Typing* 42 (2d ed. 2005)). Because DNA testing technology "is sensitive enough to pick up such trace amounts of DNA," it is also affected by "even the slightest, unintentional mishandling of evidence." *Id.* at 82.

Once DNA is extracted, the analyst must "measure the amount of DNA in the sample accurately" which is "essential" because later stages of DNA analysis require a specific concentration of DNA. Brief of Innocence Network at 17 (citing John Butler, *Fundamentals of Forensic DNA Typing* (Academic Press 2010)). Too much or too little DNA used in the test can result in an inaccurate profile. *Id.* at 17-18.

Generating DNA profiles requires amplifying the extracted alleles, which is a "challenging" process. *Id.* at 19. Amplification requires the analyst to add chemicals to water in a "proper volume and concentration," "precisely set" the temperature in the thermal cycler machine, and pay close attention to the number of cycles run. *Id.* at 18-19. This process "is very sensitive to small amounts of DNA, [and] even minute contamination can skew the results." *Id.* at 19.

Additional potential for error occurs in separating the DNA and detecting the alleles. *Id.* at 20. If multiple samples are tested, cross-sample contamination may occur and some types of tests are more susceptible to contamination. *Id.* at 20-21. Interpreting the data, particularly in a mixed sample of two or more individuals depends on subjective judgment. *Id.* at 22-23; *see also Melendez-Diaz*, 557 U.S. at

320 (forensic analysis includes methodology that "requires the exercise of judgment and presents a risk of error").

When the Washington State Patrol Crime Laboratory detected "very low" quantity of DNA on a glove taken from the apartment where the shooting occurred, the sample was so small that it could not test for a DNA profile without consuming it. 5/29/12RP 181. Once consumed, no one else would be able to conduct any confirmatory testing. *Id.* at 162. Although a DNA expert could review the notes she took, Ms. Low did not believe her notes were a substitute for independent testing or contemporaneous observation. *Id.* at 162, 190-91. The prosecution had ample opportunity to notify the defense and it knew the defense requested advance notice of such testing. Indeed, the prosecutor admitted his usual practice would be to notify the defense or ask for a court order approving the testing. CP 75. Yet the prosecution did not follow its own protocol before authorizing the consumptive testing and it offered no explanation for this failure.

c. *Independent review of DNA testing is common practice yielding important results.*

DNA expert Donald Riley condemned the State's secretive consumption of the sole DNA evidence as a "serious breach of the

scientific method which requires independent verification." CP 126; *see* CP 108. The presence of an independent observer during DNA testing is "a common practice in forensic examinations." CP 127.

Indeed, it is the practice of the prosecution and the State Crime Lab to provide advance notice to the defense in the event it wishes to have an independent observer present for the DNA testing when it will consume the entire sample. 5/29/12RP 160-61. The prosecutor admitted his regular practice would be to obtain a court order, but in what he called an "oversight," he directed the State Crime Lab to use the entirety of the DNA evidence without independent observation. CP 75. He gave no explanation about why he did not inform defense counsel of his orchestration of the DNA consumption. CP 75. The State Crime Lab's policy, contained in its written standard operating procedures, is to obtain permission from the pertinent prosecution or law enforcement authority prior to testing an item when the test is likely to consume "more than half the sample." CP 100. The reason for this policy is because the test will "take away" the defense's opportunity to retest and "we need" to let them know in advance. *Id.*

Mr. Riley explained the risks of erroneous results that may be detected by independent observation and also detailed issues raising the

potential for contamination or erroneous results in the case at bar. The mixed sample of DNA that generated the purported match with Mr. Dunya's DNA was extracted from a very low quantity of material. 5/29/12RP 142. One nanogram is the minimum amount of trace evidence that may be tested for DNA and the forensic scientist found far less than that – 0.102 nanogram – of potential DNA. 5/29/12RP 182; 6/4/12RP 465. Forensic Scientist Low obtained the minimum amount needed for testing by amplifying this DNA until she enough to test it. 5/29/12RP 182-83.

However, this minute about of biological material from the glove was stored in a paper bag, which is a porous material, along with Mr. Dunya's own DNA. 5/29/12RP 155; 6/4/12RP 472. In paper containers, grains of DNA matter can escape. 6/4/12RP 469. The "reference sample" from Mr. Dunya contained far more DNA than the sample from the glove. 6/4/12RP 472. It should not have been kept in the same place, or tested on the same day, as the glove due to ease with which a few DNA molecules can contaminate another sample either during testing or while stored. 6/4/12RP 467, 472. By storing the two samples together, held in a porous paper cover, and extracting DNA on the same day, the results could not be trusted. 6/4/12RP 469, 472.

The testing scientist Ms. Low agreed that her notes were not a substitute for independent observation or confirmatory testing of her DNA findings. 5/29/12RP 190-91. She acknowledged that the blank reagent test showed there were contaminants in the DNA tested from the glove. *Id.* at 183-85. Ideally, this separate test would be blank but in fact, there was some contamination of the glove test. *Id.* at 184. There was no way to know the source of this unidentified DNA, but this possibly of contamination heightened the danger from consuming the DNA so that no confirmatory tests could be undertaken.

d. *The prosecution ordered that the State Crime Lab consume the entire DNA sample despite prior defense requests for notice in bad faith.*

Whether the prosecution's direction to the State Crime Lab authorizing consumption of the DNA evidence was undertaken in bad faith is measured by whether the order was issued as a matter of "[d]ishonesty of belief or purpose." *Black's Law Dictionary*, 134 (7th ed. 1999).

The state's compliance with established policy is evidence of good faith; conversely, noncompliance with protocol and practice demonstrates bad faith or dishonesty of purpose. *State v. Ortiz*, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992); *see also State v. Copeland*, 130

Wn.2d 244, 280-81, 922 P.2d 1304, 1325 (1996) (FBI's compliance with established policy of not preserving evidence once testing complete not indicative of bad faith). For example, in *Trombetta*, the police acted according to their general practice when they did not preserve breath samples.

Here, the prosecution disregarded established policy and regular practice when ordering the consumption of DNA evidence from the crime scene and it conceded as much. CP 75. Moreover, it ordered consumption of the evidence even after receiving specific requests from both defendants to preserve such evidence or notify the defense of its testing. Its failure to comply with its own practice and protocol, in the face of specific preservation and notice requests, demonstrates that the consumption order was issued to block any independent verification of the tests, in bad faith. The prosecution acknowledged that it viewed the evidence as likely to be exculpatory for one of the two charged defendants, because a videotape from the crime scene showed one person entering and leaving the apartment, not two. CP 204. Yet it ordered the State Crime Lab to consume the evidence, and prevent retesting or independent observation of the testing. CP 106.

This inexplicable and bad faith consumption of evidence constitutes a violation of the State's obligation to act in the interest of fairness and undermines the fundamental fairness of the proceedings.

e. *The right to due process requires imposing a meaningful sanction upon purposeful destruction of evidence by the prosecution.*

Due process is a flexible concept based on the factual circumstances of each case in an attempt to ensure both fairness and integrity of the proceedings. *Chambers*, 410 U.S. at 204; *Darden*, 145 Wn.2d 620. A prosecutor must function within the boundaries of a fair judicial proceeding and "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday,* 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

In *Monday*, the court reversed a first degree murder conviction because the prosecutor used racially charged language, despite a videotape showing the shooting as it occurred and notwithstanding the defense attorney's failure to object to the misconduct. *Id.* at 678-79. The reason for reversal was the court's refusal to sanction a conviction obtained by use of racially derogatory arguments, because such conduct is "so fundamentally opposed to our founding principles, values, and fabric of our justice system." *Id.* at 680. The fundamental right to "a fair

and impartial trial" commands sanction for the prosecution's deliberate conduct that undermines the fairness of the fact-finding process. *Id.*

Here, the prosecution disregarded its practice and undermined the State Patrol Crime Lab's standard operating procedure by ordering the consumption of DNA evidence without permission from the court or parties, even though it would have been easy to preserve the sample until properly verified testing could occur. The court refused Mr. Dunya's request to suppress the improperly obtained DNA evidence. The only remedy the court allowed was that rather than calling the prosecutor as a witness, the defense would be permitted to elicit testimony from the Crime Lab's forensic analyst that she informed law enforcement that her test would consume the available sample, received permission to test the DNA, and later learned that the defense was not made aware of her request for permission to consume the DNA. 5/29/12RP 159-62. The court would not permit Mr. Dunya to admit the letter the forensic scientist sent to law enforcement seeking permission or the prosecutor's responsive letter authorizing consumption of the evidence. 5/29/12RP 163.

The court's remedy was inadequate. The DNA evidence obtained from swabbing the glove was the only forensic evidence that

showed Mr. Dunya's connection to the crime scene. Without that evidence, the jury would have focused on the fact that Ms. Buchanan initially confessed, said good-bye to her family, and attempted suicide; she had just learned Mr. Dunya might be unfaithful to her and their relationship was failing; and she was despondent and unstable. Although Mr. Dunya had a reason to be upset with Ms. Dunya, due to the frustration of divorce and child care, his purported fear that she might move out of state with their child would have been contrary to the parenting agreement. 5/30/12RP 419-20. Ms. Dunya's lawyer testified that Ms. Dunya wanted Mr. Dunya to be part of their child's life and was not trying to move him away. *Id.* at 416. The remaining evidence was inconclusive and speculative. Because the prosecution purposefully tested and consumed the DNA evidence to preclude independent verification, and this DNA was critical to its case, the prosecution's action undermines confidence in the fairness of the fact-finding process and was undertaken in bad faith. Mr. Dunya is entitled to a new trial where the improperly destroyed evidence is suppressed.

2. **By offering police officers's opinions on the identity of the suspect in a videotape, and reenacting scenes from the videotape with police officers as actors, the prosecution used unfair tactics to obtain a conviction**

a. *A police officer's opinion about the person in surveillance videotape invaded the province of the jury.*

When the prosecution offers visual evidence, it is the job of the jurors to form opinions and conclusions from it. *Ashley v. Hall*, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999). A witness may relate his own observations, made first-hand, but not his interpretation of a photograph or videotape unless the witness's opinion helps the jury understand testimony or a fact in issue otherwise not apparent to the jurors. ER 701; ER 704; *State v. George*, 150 Wn.App. 110, 117, 206 P.3d 697, *rev. denied*, 166 Wn.2d 1037 (2009).

Witnesses must testify about things within their personal knowledge. ER 602. A lay witness may testify as to the identity of a person in a surveillance photograph or videotape only if "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury." *George*, 150 Wn.App. at 118 (quoting *State v. Hardy*, 76 Wn.App. 188, 190-91, 884

P.2d 8 (1994), *aff'd*, *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996)).

For example, in *Hardy*, a police officer who had known the defendant for several years testified that the person in a videotape had similar features to Mr. Hardy. 76 Wn.App. at 189, 191. Because the videotape was "grainy" and the officer had personal knowledge of how the defendant moved on the street, the officer was in a better position to identify the defendant. *Id.* at 191-92.

On the other hand, in *George*, the prosecution showed a poor quality surveillance videotape and photographs from the video involving a robbery. 150 Wn.App. at 115. One of the arresting officers testified about the identity of the men in the surveillance video. *Id.* The court ruled that the officer's opinion was inadmissible because his minimal prior contacts with the defendants at the time of arrest did not make him better positioned than the jury to identify whether the defendants were pictured in the videotape. *Id.* at 119.

When a police officer's knowledge of the defendant is based upon photographs and witness descriptions, the officer's opinion that the defendant was pictured in several surveillance photographs is of "dubious value" and runs "the risk of invading the province of the jury

and unfairly prejudicing" the accused. *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). The jury can view the surveillance photographs "and make an independent determination whether it believed that the individual pictured in the photos was in fact" the accused. *Id.* Not only is the testimony inadmissible, but it risks unfairly prejudicing the accused. "[T]he use of lay opinion identification by policemen" is particularly dangerous and should only be offered when there is no alternative. *Id.*

Here, Mr. Dunya moved in limine to bar the State from eliciting opinion testimony that Mr. Dunya was the person in the surveillance videotape. CP 92-93; 5/21/12(vol. 2)RP 14. The prosecution agreed no one could tell from the video that the person was Mr. Dunya. 5/21/12(vol. 2)RP 19-21. However, the court permitted a police officer to testify that the person in the videotape had a dark complexion, as opposed to being white. *Id.* at 24; 5/23/12RP 179, 186; Exs. 117, 119, 120. A second detective claimed that the person in the video must be a male, close to 5'10" tall, and not a woman or shorter person. 5/29/12RP 99. The court also allowed the officer to testify that the person in the videotape was carrying an item that looked like a long barreled rifle,

despite Mr. Dunya's objection that what was in the person's hand was for the jury to decide. 5/21/12(vol. 2)RP 14; 5/23/12RP 172.

The officer's testimony was derived solely from what he saw on the video screen. 5/23/12RP 158. He did not know Mr. Dunya and had no personal observations of Mr. Dunya on which to base his opinions. His impressions of what he saw on the videotape are the same type of impressions jurors could make from watching the videotape. Exs. 117, 119. The jury could decide whether the person was Mr. Dunya and whether the dark, blurry object in his hand was a firearm.

The officer's opinions did not help the jury assess evidence. Instead, his testimony amounted to impressing the jury with a police officer's opinion of what the videotape showed. *See LaPierre*, 998 F.2d at 1465; *George*, 150 Wn.App. at 118. The quality of the image on the videotape is not particularly clear, as the prosecution conceded it is not clear enough to tell who the person is, so its content would be open for debate by the jurors. 5/21/12(vol. 2)RP 20. The prosecution tried to persuade the jurors to accept a police officer's view of the race of the person on the videotape showed, which constitutes an improper use of photographic evidence that is likely to prejudice the accused.

b. *The officer's opinion of the ethnicity of the person in the videotape was a proxy for race.*

Skin color is a device for assigning people to a racial category. Trina Jones, Shades of Brown: The Law of Skin Color, 49 Duke L.J. 1487, 1497 (2000). Appeals to racial prejudice "may not be blatant" but is still impermissible. *Monday*, 171 Wn.2d at 678-79. "Perhaps more effective but just as insidious are subtle references. Like wolves in sheep's clothing, a careful word here and there can trigger racial bias." *Id.* at 678.

The trial court agreed that the police should not tell the jury that the person in the videotape appeared African American, but ruled that the officer could say the person was "a dark complected male." 5/23/12RP 43. The officer testified that the suspect had "a darker complexion" than people shown at other times in the video. 5/23RP 186. He repeated that the suspect "has a darker skin tone than five visible subjects in the other three images." 5/29/13RP 97.

Barring the prosecution from offering an officer's opinion that the person in the videotape was African American but permitting him to call the person "dark complected" was simply a proxy for race. The jury could view the videotape and discern whether the person looked like

Mr. Dunya. The officer's opinion that the person was someone with a "dark skin tone," like Mr. Dunya, was not based on his personal knowledge or tools that were not available to the jury. Instead, the officer's testimony amounted to an implicit opinion that Mr. Dunya was the person in the videotape and this opinion was inadmissible.

c. *The videotaped reenactment of the surveillance video should not have been admitted.*

A reenactment of events by police officers is "fraught with danger," because the jury may base its assessment on the reenacted images rather than the evidence and testimony from the scene. *State v. Stockmyer*, 83 Wn.App. 77, 84-85, 920 P.2d 1201 (1996).

The police arranged for two officers, one close in height to Mr. Dunya and the other close in height to Ms. Buchanan, to wear the same red jacket purportedly worn by the person in the surveillance video. 5/29/12RP 59-60. They acted out several scenes from the surveillance video while wearing the suspect's clothes. 5/29/12RP 63; Ex. 119. The police positioned the person next to the place where the suspect stood in the video then slowly overlaid the images, so that the officer-actor progressively moves into a position where he or she is on top of the suspect. Ex. 119.

The reenactment also contained lines drawn by the person's head, to show height differences. 5/29/12RP 64. Due to the scale of the images, the differences in height between the claimed height of the actors and suspect appear minimal. Ex. 119. The detective explaining the reenactment acknowledged it was impossible to accurately replicate the image as slight differences in foot positioning, show height, stance or camera angle would alter the minimal differences in height as displayed in the reenactment. 5/29/12RP 68. Nonetheless, the detective concluded that the suspect was close to 5'10" in height, like Mr. Dunya. *Id.* at 71. He also asserted that the suspect was "built" like a 5'10" "male," not a woman, there was "no way" the person pictured could have been 5'3" or 5'4." *Id.* at 99.

d. *The improperly admitted evidence impermissibly affected the outcome of the case.*

Improperly admitted evidence that impacts the jury's deliberations causes reversible error. *See State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). Impermissible opinion testimony denies a person a fair trial and invades the province of the jury, as protected by article I, section 21. *State v. Johnson*, 152 Wn.App. 924, 934, 219 P.3d 958 (2009). Such an error must be proven harmless beyond a

reasonable doubt. *Id.* For other evidentiary error, "where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)).

In *Salas*, the immigration status of an injured worker was introduced to show his lost future earnings in a wrongful termination case. 168 Wn.2d at 670-71. The Supreme Court found evidence of immigration status far more prejudicial than probative, and because the inherent risk of prejudice was great, "we cannot say it had no effect on the jury" and entitled Mr. Salas to a new trial. *Id.*at 673.

In *Thomas*, the trial court admitted into evidence a letter containing inadmissible hearsay. 99 Wn.2d at 101-03. In its harmless error analysis, the *Thomas* Court found the letter was cumulative of trial testimony but could have bolstered the plaintiffs' credibility as additional evidence favoring its claims and, "[s]uch reinforcement may well have prejudiced the jury's assessment of respondents' testimony in other respects." *Id.* at 105. Since the reviewing court could not know what value the jury placed on the improperly admitted evidence, the court ordered a new trial. *Id.*

It invaded the province of the jury for police detectives to instruct them on the suspect's dark complexion, which served as a proxy for race even though the race of the person. While height comparisons are proper, the reenactment video created by the police was fraught with unreliability and not helpful to the jury. Having police officers wear evidence collected in the case and stand near the suspect was likely to sway the jury to decide the case based on how police officers positioned themselves not based on the actual images from the surveillance cameras.

The jurors could observe the video and discern what it showed about the identity of the person pictured. The opinion testimony and unreliable reenactment by police officers should not have been admitted. This evidence was likely to sway the jury for improper reasons and likely affected the outcome of the case.

3. The court impermissibly imposed a firearm enhancement when the jury's special verdict found only that Dunya possessed a "deadly weapon"

"[S]entences entered in excess of lawful authority are fundamental miscarriages of justice." *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 563, 243 P.3d 540 (2010). "When a sentence has been

imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered." *In re Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

The court exceeds its authority by imposing the punishment allotted to a firearm enhancement when the jury's verdict merely found the defendant possessed a "deadly weapon." *State v. Williams-Walker*, 167 Wn.2d 889, 898-99, 225 P.3d 913 (2010); U.S. Const. amend. 6; Wash. Const. art. I, §§ 21, 22.

In the three consolidated cases in *Williams-Walker*, each defendant was charged with a firearm sentencing enhancement, but the court instructed the jury on the definition of a deadly weapon and asked the jury to find whether the defendant possessed a deadly weapon. *Id.* at 893-94. Each defendant was also convicted of a predicate crime that involved using a firearm. *Id.* However, the Supreme Court held that guilty verdicts on a predicate offense are not "sufficient to authorize sentencing enhancements." *Id.* at 899. Instead, the governing statute and the constitutional right to a jury trial require that the jury authorize the additional punishment by a special verdict. *Id.*

Just as in *Williams-Walker*, the court instructed Dunya's jury that "for purposes of a special verdict," it must decide whether Dunya

was "armed with a deadly weapon." CP 59 (Instruction 15). Instruction 15 explained the requirements of the special verdict finding. *Id.* It was the only instruction directed at answering the special verdict. It defined a deadly weapon as including a "pistol, revolver or other firearm whether loaded or unloaded," which is the statutory language for defining a "deadly weapon" and not a "firearm" for purposes of the firearm sentencing enhancement. *Id.*; RCW 9A.04.010(6); RCW 9.41.010; RCW 9.94A.533(3). The special verdict form asked the jury whether Dunya was "armed with a firearm at the time of the commission of the charged crime" but this question was based on Instruction 15, which termed any firearm as falling under the broad definition of deadly weapon. CP 37, 59.

A sentencing enhancement must be authorized by the jury in the form of a special verdict. *Williams-Walker*, 167 Wn.2d at 900. The instruction that explained the special verdict to the jury simply asked whether the State proved he possessed a deadly weapon. CP 59. Because the court's instruction dictates the nature of the special verdict finding, the fact that the verdict form phrased the question was whether Mr. Dunya had a firearm does not trump the court's direct instruction that the jury premise its special verdict form finding on a deadly

weapon. "When the jury is instructed on a specific enhancement," the jury's special verdict finding does not authorize the court to impose the penalty for a greater enhancement. *Williams-Walker*, 167 Wn.2d at 899. Consequently, the firearm enhancement was not authorized by the jury's verdict and must be stricken.

E. CONCLUSION.

Keayn Dunya's conviction should be reversed and a new trial ordered due the denial of his right to a fair trial by jury. Additionally, the firearm enhancement must be stricken.

DATED this 22nd day of November 2013.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 68915-1-I
	)	
KEAYN DUNYA,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	KEAYN DUNYA 658584 WSP 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF NOVEMBER, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711