70069-3

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NO. 70069-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOJO EJONGA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE PATRICK OISHI

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

In a new assignment of error, the defendant claims that he served a subpoena on the Des Moines Police Department within days of his arrest, seeking to obtain an in-car video from a patrol car, and that instead of turning over the video, the police intentionally destroyed it. Should this Court reject the defendant's claim because the defendant's factual claim is not true, and because the video in question was not material or inculpatory?

B. STATEMENT OF THE CASE

PROCEDURAL FACTS

On March 26, 2014, the defendant filed a Brief of Appellant. On June 18, 2014, the State filed its Brief of Respondent. One day later, the defendant moved for permission to file an Amended Brief of Appellant. On July 16, 2014, this Court granted the defendant's motion, adding that the State would be allowed to file an Amended Brief of Respondent upon receipt of the defendant's Amended Brief of Appellant. On October 24, 2014, the defendant filed his Amended Brief of Appellant.

In the defendant's original opening brief, he raised a claim of ineffective assistance of counsel, a claim he renews in his Amended Brief of Appellant. The State believes its original Brief of Respondent fully and

completely addresses this issue and therefore the State relies upon its original Brief of Respondent to address that issue.

In a new assignment of error, the defendant claims a due process violation, that after receiving a subpoena, the Des Moines Police Department intentionally destroyed exculpatory evidence, specifically, an in-car video from a patrol car. In what the State has titled a Supplemental Brief of Respondent, the State addresses this issue, and this issue only.

C. ARGUMENT

THE DEFENDANT'S CHALLENGE TO THE TRIAL COURT'S DENIAL OF HIS MOTION TO DISMISS IS NOT SUPPORTED BY THE FACTS OR THE LAW

The defendant claims that on May 12, 2011 -- just four days after he stabbed the three victims, he filed a subpoena on the Des Moines Police Department in order to obtain an in-car video, that the in-car video was material and exculpatory, and that the Des Moines Police Department subsequently and intentionally destroyed the video. Def. br. at 9, 48. He claims this was a due process violation and that the trial court abused its discretion in denying his motion to dismiss. His claim should be denied. The defendant's motion is based on an incorrect recitation of the facts and his motion is not supported by the law.

1. The Facts

On December 6, 2012, as the parties were discussing the potential length of the trial, the prosecutor informed the court that he did not intend to call some of the witnesses listed on the State's witness list. 12/6/12 RP 10-11. One of the persons the State did not intend to call as a witness was Des Moines Police Officer Coppedge. Id. The State indicated that, in any event, the defendant was objecting to Officer Coppedge being called as a witness. Id. The court indicated that the defendant's issue with Officer Coppedge testifying was thus a "non-issue." Id. at 60. Still, on December 20, 2012, the issue was raised again.

According to the party's discussions with the court, the defense motion to prohibit Officer Coppedge from testifying was based on a defense claim that in January of 2012, the defendant's trial counsel, Juanita Holmes, had made a request, via a subpoena, for the officer's in-car video made on or about May 8, 2011, only to find out that it no longer existed. 12/20/12 RP 67-69. Per department policy, if no specific request is made within 90 days of a recording, a video is not preserved. 12/20/12 RP 70, 74. Here, the request was made some eight months after the video was made.

Officer Coppedge was not the arresting officer, nor is there any indication in the record that he was ever at the scene of the crime or the

scene of the defendant's arrest. Id. at 71. Rather, at some unspecified later point in time, Officer Coppedge transported the defendant to the hospital, where he had a wound on his hand stitched, and then back to the Des Moines Police Station. 12/20/12 RP 71; 1/2/13 RP 14.[1]

The issue was being raised again only because the defense was asserting that the video from Officer O'Flaherty's patrol car showed the defendant asking about his parents (plural) even though his father had died years ago.[2] According to the prosecutor, the defense mental health expert would potentially opine that the defendant asking Officer O'Flaherty about his parents, even though his father was dead, was evidence that the defendant was in the midst of a psychotic episode. 12/20/12 RP 68. If the video from Officer O'Flaherty's patrol car was presented by the defense and relied on by the defense expert, the State indicated that it may then call Officer Coppedge in rebuttal, as his testimony was now potentially relevant. 12/20/12 RP 68. Specifically, per Officer Coppedge's written

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[1] An in-car video from the scene of the defendant's arrest did exist. Officer Shawn O'Flaherty's patrol car was equipped with a video and audio recording system. 1/10/13 RP 120. Officer O'Flaherty responded to the scene of the defendant's arrest whereupon he placed the defendant into his patrol car and transported him to the Des Moines Police Station. Id. at 126-28. This video was preserved and provided to defense counsel. 12/20/12 RP 69-70.

[2] There was a dispute as to whether the video from Officer O'Flaherty's patrol car actually showed this. The State claimed that while the defendant was in the back seat of the patrol car, he asked Officer O'Flaherty something, but because of the partition between the front and back seat, O'Flaherty could not understand what the defendant was saying. After asking him to repeat himself, the State asserts that the defendant is heard saying "parent" (singular), while O'Flaherty, in trying to clarify what the defendant was saying, is the one who can be heard saying "parents" (plural). 1/2/13 RP 16.

report, while transporting the defendant to the hospital, the defendant asked Officer Coppedge if he knew anything about his "mother," to which the officer responded "no." Id. at 67; 1/2/13 RP 14. That is apparently the full extent of the "evidence."[3]

Defense counsel told the court that she was not making a motion to dismiss, acknowledging that there was no bad faith on the part of the State and that by the time she had been assigned to the case, it was already past 90 days.[4] Id. at 70-73. Counsel indicated that she was merely asking that Officer Coppedge not be allowed to testify because the video was not preserved. Id. at 73. Counsel also admitted that whatever the video showed, it was "very tangential" at best. Id. The court initially denied the motion but then reserved ruling so that defense counsel could conduct further research on the issue. Id. at 76-77.

On January 2, 2013, Holmes informed the court that in prior counsel's Notice of Appearance and Request for Discovery that was filed with the court, he had requested that all physical evidence be preserved.

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[3] In his Amended Brief of Appellant, the defendant asserts that while in Officer Coppedge's custody, he "made statements regarding his present state of mind and his belief that he was acting out of self-defense." Amended Br. of App. at 8. In making this claim, he does not cite to the record. In point of fact, there is nothing in the record that he said anything other than what is stated above regarding him asking about his mother.

[4] Holmes did not enter a notice of appearance on the case until October 17, 2011, when she took over as trial counsel for the public defender who had been assigned to the case. CP 12-14.

1/2/13 RP 12, 17-18.[5] Specifically, the Notice of Appearance states in pertinent part "you are requested to preserve all physical evidence relating to the alleged offense including, but not limited to, police communications (911) tapes, and the scene of the alleged crime until final disposition of this cause or until further order of this Court." CP 8. Based on this added fact, Holmes decided to make a motion to dismiss based on the claim that the police failed to preserve the video. 1/2/13 RP 12. The court denied the motion, finding that there was no bad faith on the part of the police in not preserving the video and that there was no reasonable possibility of the video being favorable to the defendant. 1/2/13 RP 19-20.

2. The Law

A trial court has wide latitude in granting or denying a motion to dismiss a criminal prosecution for a discovery violation. State v. Woods, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001). Consequently, an order denying a motion to dismiss is reviewed for manifest abuse of discretion. State v. Beliz, 104 Wn. App. 206, 211, 15 P.3d 683 (2001). A trial court must keep in mind that dismissal of a criminal prosecution "is an

[5] Tim Johnson of The Defender Association filed his Notice of Appearance and Request for Discovery on May 16, 2011. CP 8-10. The notice indicates that he was appearing for the defendant's arraignment. CP 8. The defendant was arraigned on May 23, 2011. CP 746. Still, it appears Johnson continued to represent the defendant until September 27, 2011, when the defendant obtained new counsel, Gordon Hill of Associated Counsel for the Accused. CP 747-48. On October 17, 2011, the defendant again obtained new counsel, Juanita Holmes. CP 12-14; CP 750.

extraordinary remedy that is warranted only if a defendant can show prejudice that materially affected his right to a fair trial." Woods, 143 Wn.2d at 582 (quoting City of Spokane v. Kruger, 116 Wn.2d 135, 144, 803 P.2d 305 (1991) and City of Seattle v. Orwick, 113 Wn.2d 823, 830, 784 P.2d 161 (1989)). On appellate review, it is not enough that reasonable minds might disagree with a trial court's ruling. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). Rather, to prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

In determining if a failure to preserve potentially exculpatory evidence amounts to a denial of due process, courts in Washington apply the standard set forth in Arizona v. Youngblood. State v. Whittenbarger, 124 Wn.2d 467, 481, 880 P.2d 517 (1994) (citing Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)), accord, State v. Copeland, 130 Wn.2d 244, 279-81, 922 P.2d 1304 (1996). That standard states that where the government fails to preserve "material exculpatory evidence," dismissal of charges is appropriate. Copeland, 130 Wn.2d at 279. "Material exculpatory evidence" is evidence which possesses an

"exculpatory value that was apparent before it was destroyed," and is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 279-80 (citing Whittenbarger, at 475). "A showing that the evidence might have exonerated the defendant is not enough." Id.

Where the State fails to disclose to the defense "material exculpatory evidence," good or bad faith on the part of the State is irrelevant. Copeland, at 280 (citing Youngblood, 488 U.S. at 57-58). In contrast, where only potentially useful evidence is concerned, as opposed to material exculpatory evidence, no denial of due process is found unless the defendant shows bad faith on the part of the police. Id.

3. Application Of The Law And Facts

Here, neither before the trial court nor before this Court does the defendant explain how it is that the video in question was exculpatory in nature. In point of fact, the video did not have any potential relevance to the case until after the defendant alleged that upon his arrest, he asked another officer about his "parents." It was only at this point in time that the video had any potential relevance – relevance limited to the State's

ability to rebut the defendant's mental health defense.[6] Thus, the video was not apparent exculpatory evidence.

Moreover, contrary to the defendant's assertion that the police destroyed the video after being served with a subpoena just four days after the crime, there is in reality, absolutely nothing in the record that the police were ever served with any subpoena or any request to preserve the video until well after the 90 day retention period. The Notice of Appearance by the defendant's first attorney, filed with the court and presumably with the prosecutor, requesting that "all physical evidence relating to the alleged offense," is clearly not sufficient to put anyone on notice that a video that is not related to the alleged offense should be retained. If the contrary were true, this would mean that any video (for example, in-jail videos, hospital videos, any and every transport video) would have to be retained no matter how long after the crime had occurred. In short, the defendant fails to show either bad faith in failing to preserve the video or that the video has any material exculpatory value to the defense. Thus, he cannot show that no reasonable person would have

[6] It is questionable whether the video would actually constitute rebuttal evidence. The fact that the defendant may have asked one officer about his "parents" is not truly rebutted by the fact that he may have asked another officer about his "mother," as Officer Coppedge wrote in his statement. Whether the trial court would have allowed Officer Coppedge to testify in rebuttal, or in the trial at all, is unknown because neither party attempted to call him as a witness.

denied his motion for a dismissal of the charges against him, the burden he must meet on appeal.

D. CONCLUSION

For the reasons cited above, and in the State's Brief of Respondent, this Court should affirm the defendant's conviction.

DATED this 10 day of November, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Mitch Harrison, the attorney for the appellant, at 101 Warren Ave N, Seattle, WA, 98109-4928, containing a copy of Supplemental Brief of Respondent, in STATE V. EJONGA, Cause No. 70069-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

11-10-14
Date

Done in Seattle, Washington