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MAR 07 2012

King County Prosecutor  
Appellate Unit

NO. 67793-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES DENSMORE,

Appellant.

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

The Honorable Douglass A. North, Judge

BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Factual History</u> .....	2
2. <u>Procedural History</u> .....	8
C. <u>ARGUMENT</u> .....	10
1. THE TRIAL COURT VIOLATED DENSMORE’S DUE PROCESS RIGHT TO A FAIR TRIAL AND TO CROSS-EXAMINE WITNESSES WHEN IT DENIED THE MOTION TO SUPPRESS TESTIMONY REGARDING THE CONTENT OF THE DESTROYED SURVEILLANCE VIDEO.....	10
2. THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT DENSMORE’S IDENTITY AS THE PURPETRATOR OF THE CHARGED CRIMES. ....	16
D. <u>CONCLUSION</u> .....	18

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>City of Seattle v. Fettig</u> 10 Wn. App. 773, 519 P.2d 1002 (1974), .....	11, 12, 15
<u>State v. Agee</u> 15 Wn. App. 709, 552 P.2d 1084, 1087 (1976) .....	15
<u>State v. Aver</u> 109 Wn.2d 303, 745 P.2d 479 (1987) .....	16
<u>State v. George</u> 150 Wn.App. 110, 206 P.3d 697 (2009) .....	14
<u>State v. Gonzales</u> 24 Wn. App. 437, 604 P.2d 168 (1979) .....	15
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980) .....	16
 <u>FEDERAL CASES</u>	
<u>Arizona v. Youngblood</u> 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) .....	10
<u>Barbee v. Warden, Maryland Penitentiary</u> 331 F.2d 842 (4 <sup>th</sup> Cir. 1964) .....	11
<u>Brady v. Maryland</u> 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) .....	10
<u>California v. Trombetta</u> 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) .....	11
<u>Giglio v. United States</u> 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) .....	12
<u>Thomas v. United States</u> 343 F.2d 49 (9 <sup>th</sup> Cir. 1965) .....	12

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>U.S. v. LaPierre</u> 998 F.2d 1460 (9 <sup>th</sup> Cir. 1993) .....	14
<u>United States v. Valenzuelea-Bernal</u> 458 U.S. 858, 102 S. 73 L. Ed. 2d 1193 (1982).....	10

**OTHER AUHTORITIES**

<u>Hanson v. Cupp</u> 5 Or.App. 312, 484 P.2d 847 (1971) .....	12
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Densmore's motion to dismiss and suppress evidence.

2. Densmore's constitutional right to a fair trial was violated when material evidence was destroyed due to the State's evidence and the court permitted testimony about the content of the destroyed evidence.

3. Insufficient evidence supports the verdicts for burglary, theft and malicious mischief.

Issues Pertaining to Assignments of Error

1. Whether the trial court violated Densmore's due process right to a fair trial and to cross-examine witnesses when it denied his motion to suppress witness testimony about the content of the surveillance video destroyed due to the State's negligence.

2. Whether the State failed to provide sufficient evidence to prove beyond a reasonable doubt Densmore committed the charged crimes.

B. STATEMENT OF THE CASE

1. Factual History

During the early morning of February 8, 2009, someone broke into the Celtic Bayou, a Redmond pub. 2RP 398-99, 3RP 542. The burglars pried open the metal door from the alley into a utility room, then broke through the drywall into the pub's bathroom. 2RP 400, 3RP 409, 538. Once inside, the burglars entered the office and a storage room and accessed cash lock boxes and the large safe. 2RP 400, 3RP 411, 412. They escaped with nearly \$5,000 in cash, having also caused \$5,000 in property damage. 3RP 412, 424. There were no witnesses to the burglary. Police were not able to obtain fingerprints. 3RP 540.

The Celtic Bayou had a surveillance system in place that recorded to a hard drive system. 2RP 398. The pub owner, Benassa Wahbi, testified that only the surveillance camera placed in the office showed three burglars. 3RP 414-16. He showed this video to Officer Jeremy Sandin, who responded the day of the break-in. 3RP 535. Officer Sandin directed Wahbi copy the video, even though Wahbi said he did not know how. 3RP 550. When Wahbi attempted to make a copy, he corrupted the hard drive, and attempts to recover the video were unsuccessful. 3RP 441-43.

Wahbi testified to his memory of the surveillance video based on watching it three or four times. 3RP 418. Wahbi saw three men, all white, all in black clothing, and one wore a baseball cap. 3RP 414. Two of the men were in their twenties and the third was in his forties or fifties. 3RP 417. One used a crowbar, to break into the small drop boxes while another collected the cash bags from inside.<sup>1</sup> 3RP 416. The third man searched the desks. 3RP 416. Wahbi only saw one man's face. 3RP 419-21.

Police focused their investigation on three suspects, James Densmore, Byron Bowman and Tyler Bowman. 3RP 446. Police showed Wahbi photo montages with pictures of Densmore and the Bowmans. 3RP 422. Wahbi selected pictures from the montages containing Densmore and Byron Bowman but he did not pick Densmore or Bowman. 3RP 422. Instead, he picked the same man, who was not a suspect 3RP 458. Regarding the Densmore montage, Wahbi told the police that the man he picked "bears some resemblance" to the man he saw in the video. 3RP 470. In selecting the same picture from Byron Bowman's montage, Wahbi told police the man "looked familiar." 3RP 470. Wahbi could not

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<sup>1</sup> At the first trial, Wahbi said the video showed the men carrying the large safe and breaking it open, but he did not mention the cash boxes. 1RP 177.

pick anyone from the montage containing Tyler Bowman. 3RP 426, 4RP 473.

Wahbi testified that when he saw the surveillance video, he thought the three men in the video looked like three men he saw in the pub the night before the break-in. 3RP 419. The men had looked around "slowly" when entering and then sat at the bar. 3RP 417. He noticed them for ten or fifteen minutes but did not get a good look at their faces. 3RP 418, 433.

Acknowledging he only saw the face of one man briefly in the video and did not get a good look at the faces of the men at the bar, he was nonetheless certain two of the men were the same, 3RP 419-21, 433. He said, "I can guarantee two of them," but did not see the face of the third. 3RP 421. He did not say which two he was sure of.

In the first trial, Wahbi testified he did not recognize Densmore in the courtroom. 3RP 425. However, in the second trial, Wahbi testified for the first time that he "knew" Densmore. 3RP 424. He admitted that could be from seeing him in the first trial. 3RP 425.

Two other Celtic Bayou employees saw three men in the bar the night before the robbery. Server Jessica Harmston testified the

three men at the bar stood out to her because they were quiet and she noticed each man went to the bathroom. 3RP 475-76. She did not see the men leave, but when she left around 11:15 p.m., they were sitting outside in a dark blue 1990s-model four-door sedan. 3RP 476.

Bartender Bryce Bentler also saw three at the bar that night. 3RP 495. The men seemed “shady” but he could not describe why. 3RP 495. There were two older men and one younger man. 3RP 496. Bentler checked their IDs; one had a birth year of 1986 and another, 1966. 3RP 496. One man called the other his son. 3RP 496. Bentler believed the men arrived around 9:00 and stayed half an hour or an hour. 3RP 496. He later saw the three men outside in their car—a four-door—smoking. 3RP 497.

Bentler saw the surveillance video but did not remember what the men in the video looked like. 3RP 495. One or two of the men in the video could have been the same men in the bar the night before. 3RP 495.

Police also showed Bentler photo montages containing Densmore and the Bowmans. He picked Tyler Bowman as one of the men and was “most confident” in that selection because his facial structure and hair were “familiar.” 3RP 500. Bentler selected

Byron Bowman but was less sure, saying he was “somewhat confident,” in this identification. 3RP 499-500. When shown the montage containing Densmore, Bentler was unsure. Although he eventually picked Densmore, he told the officer that he looked “similar” but the man in the bar had lighter skin. 3RP 502.

Officer Sandin testified he watched the surveillance video with Wahdi several times on February 8. 3RP 542-3. Officer Sandin said the first suspect was a white male in his thirties with a goatee, wearing a black hooded sweatshirt with the hood up, light pants, and gloves. 3RP 543. The second man was a white male in his twenties or thirties with no facial hair, wearing a light hooded sweatshirt, dark pants and gloves. 3RP 543, 546. This was the only man whose face was visible, and only in profile. 3RP 543. About the third man, he could only say he wore a white hooded sweatshirt, light pants and gloves. 3RP 544. Officer Sandin could not identify anyone in the courtroom one of these suspects he saw in the video. 3RP 546.

Detective Dennis Montgomery searched the home Densmore shared with his daughter and with the Bowmans. 3RP 507. In the search, police found tools including pry bars and sledge hammers in the garage, some in bags, as well as some gloves and

sweatshirts. 3RP 512. Some of the items were covered in white dust similar to drywall dust. 3RP 511, 512. In the master bedroom, which Densmore occupied, police found a bag containing two screwdrivers, a visor light and keys. 3RP 516, 517. In another bedroom, police found one pry bar and a sledge hammer. 3RP 575. Police found a bag containing two gloves and a box cutter in the trunk of Densmore's car, a black 1993 Infinity Q45 four-door sedan. 3RP 509, 516, 527.

Detective Montgomery testified these tools were common tools of burglary. 3RP 519. He admitted he did not make note of other tools more consistent with construction in general because he was only looking for burglary tools. 3RP 520-21, 530.

In closing, the State acknowledged that the central was whether the State proved Densmore was one of the burglars. 3RP 565. The prosecutor repeatedly referred to the destroyed surveillance video and what the witnesses remembered seeing in it. 3RP 370-72.

## 2. Procedural History

On May 24, 2010, the State charged Densmore and the Bowmans with second degree burglary. CP 1. On April 5, 2011, the State amended the charges as to Densmore only to add first degree theft and first degree malicious mischief. CP 9-11.

Before trial, Densmore moved to dismiss the charges due to the State's negligence in failing to preserve the surveillance video. 1RP 16-17; Supp. CP, Defense Motion to Dismiss, at 2-5. The court denied the motion, finding the police had no obligation to seize the video on February 8 because at that point they were unaware the evidence would be destroyed. 1RP 20, 25.

Densmore moved to suppress testimony about what the owner, bartender, and police saw in the video. In particular, Densmore moved to suppress identification of the suspects based on what was seen in the video. 1RP 26; Supp. CP, Defense Motion to Dismiss. Defense counsel argued such testimony would violate Densmore's due process right to a fair trial because the defense never saw the video and could not show it to the jury or use it to challenge a witness' testimony or identification. 1RP 27, 29. The court denied the motion. 1RP 35.

Densmore also moved exclude the identifications from the photo montages, arguing that they were impermissibly suggestive in that Densmore's and Byron Bowman's arrays included three of the same "filler" photos. 1RP 36-37. The court denied the motion because Densmore's montage was the first one shown to the witnesses. 1RP 43.

Densmore's first trial ended with a hung jury, and the court declared a mistrial. RP 154; 2RP 355.

The second trial began on June 2, 2011. 2RP 394. A jury found Densmore guilty as charged. CP 121-23.

The court sentenced Densmore to an exceptional consecutive sentence, running the 51-month sentence for second degree burglary consecutive to the 43-month sentences for first degree malicious mischief and first degree theft. CP 180. The court based the exceptional sentence on its finding that Densmore's offender score otherwise resulted in some of the current offenses going unpunished. CP 185. This appeal timely follows.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED DENSMORE'S DUE PROCESS RIGHT TO A FAIR TRIAL AND TO CROSS-EXAMINE WITNESSES WHEN IT DENIED THE MOTION TO SUPPRESS TESTIMONY REGARDING THE CONTENT OF THE DESTROYED SURVEILLANCE VIDEO.

To protect the defendant's due process right to a fair trial under the Sixth and Fourteenth Amendments, criminal defendants must have access to the evidence against them. United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S. . 3440, 73 L. Ed. 2d 1193 (1982). To protect that right, the State must produce upon request evidence favorable to an accused where the evidence is material either to guilt or to punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

After Brady, the Court extended the rule to evidence that is destroyed before it can be disclosed to the defense. The Court held that where the State has lost or destroyed the evidence, suppression is required when the defendant shows that the State lost or destroyed the evidence in bad faith. Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). Evidence must also be disclosed when it possesses "an exculpatory value that was apparent before the evidence was destroyed" and is "of such a nature that the defendant would be

unable to obtain comparable evidence by other reasonably available means.” California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

In City of Seattle v. Fettig, 10 Wn. App. 773, 776, 519 P.2d 1002 (1974), the Court held the negligent destruction by the police of a video recording taken of the defendant completing a sobriety test violated due process. In that case, the officers were allowed to testify to their observations regarding Fettig’s performance of the tests. Id., at 775. The court held that:

The video tape was a record of that performance, either substantiating or rebutting the officer’s testimony. It was therefore material to Fettig’s case since the testimony of the officers was the only evidence admitted against him, except the rebuttable presumption of intoxication evidenced by the .12 breathalyzer reading.

Id. The Court noted that to affirm the denial of a motion to suppress, “the reviewing court must find that the trial court would have given ‘no weight’ to such evidence.” Id. at 776, citing Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 845, (4<sup>th</sup> Cir. 1964). The Court held, therefore, that the video tape was “material and favorable to the defendant.” Fettig, at 776. Further, it was irrelevant whether the destruction of the video was negligent or deliberate; “the defendant’s due process rights are affected in either

case.” Id. at 775, citing Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Thomas v. United States, 343 F.2d 49, 53-54 (9<sup>th</sup> Cir. 1965); Hanson v. Cupp, 5 Or.App. 312, 484 P.2d 847 (1971).

In this case, the surveillance video was intact when Officer Sandin responded to the scene. 3RP 542-3. It was immediately clear to the officer at the scene that the surveillance video contained material evidence. 3RP 542-43. Sandin asked for a copy of the relevant footage. 3RP 545. Wahbi told Sandin he did not know how to make a copy from the hard drive. 3RP 545. But instead of collecting the hard drive to permit trained professionals to recover the footage, Sandin directed Wahbi to attempt to make a copy. 3RP 545. Attempting to follow the officer’s direction, Wahbi corrupted the hard drive, and the footage was irretrievably lost. 3RP 423, 3RP 443. Twenty days after Sandin saw the surveillance video, Detective Coats went to pickup the hard drive, but the footage was already destroyed. 3RP 441-42.

The court erred when it denied the defense motion to suppress testimony about the contents of the video. 1RP 35. .

In this case, as in Fettig, the destroyed evidence was material to the case. The only issue here was identity, and the only

identifications, tenuous as they were, came from witnesses who viewed the video and were permitted to testify about it. Although the defense was never able to see the video and it was not available to show it the jury, the State was permitted to introduce testimony about what Wahbi, Sandin, and Bentler saw on the video. Specifically, Wahbi testified to the actions he saw the suspects take in the video, described the suspects he saw in the video, and opined the suspects in the video were the same men he saw at the bar the night before the robbery. 3RP 414-421. Officer Sandin described for the jury the suspects in the video, but could not identify Densmore or the Bowmans. 3RP 543-44, 546. Bentler testified “one or two” of the men in the video might have been the same men he saw in the bar the night before. 3RP 495.

The three witnesses’ memories of the video varied drastically, both in their descriptions of the suspects and in the suspects’ actions. For example:

- Wahbi said two of the men were in their twenties and one in his fifties, 3RP 417; while Officer Sandin testified one was in his thirties, one in his twenties and he could not tell about the third, 3RP 544.
- Officer Sandin said two of the men were in light clothing, the third in dark, and all had their hoods up, 3RP 543-44, while Wahbi said all three men were in

dark clothing— with no hoods—and one wore a baseball cap, 3RP 414.

- Officer Sandin could not see any of the men closely enough for identification, 3RP 543-44, while Wahbi claimed to have seen enough to identify them as the same as the men in the bar the night before, 3RP 421.
- Wahbi testified in the first trial that he saw the suspects enter the office, search it, carry the safe in and slam it on the ground to break it open, then leave, 1RP 177; while in the second trial, he testified he saw the suspects use a crowbar to open the small lock boxes, never mentioning the destruction of the safe. 3RP 414-15.

Given these facts, Densmore's lack of access to the video impaired his ability to put on a defense. Without the video, Densmore could not directly challenge the witnesses' testimony about what could be seen in the video, and particularly whether it was possible to identify anyone from it. Normally, controlling law prohibits a lay witness from giving opinion testimony as to the identity of a person in a surveillance video because this unfairly prejudices the defendant and invades the province of the jury. State v. George, 150 Wn.App. 110, 118, 206 P.3d 697 (2009), citing U.S. v. LaPierre, 998 F.2d 1460, 1465 (9<sup>th</sup> Cir. 1993). Yet, ironically, because the video was destroyed through the State's negligence, the State was permitted to put on exactly that kind of

testimony. Wahbi testified that he was able to be certain of his identifications based only on what he saw in the video. 3RP 419-21. Officer Sandin and Bentler could not identify faces from what they saw in the video, but Sandin testified at length about the descriptions of the individuals. 3RP 543-44, 546. The credibility of these witnesses, the only identity witnesses, was crucial to the State's case, and the prosecutor repeatedly used the fact that the witnesses saw the video to the otherwise weak identification testimony. 3RP 570-73.

It is true that in this case, unlike in Fettig, that the video was not in the custody of the police at the time it was destroyed. However, Officer Sandin knew that the video was crucial evidence and he directed Wahbi to make a copy for the State rather than taking the hard drive into evidence. 3RP 545. Generally, the actions of a private citizen can only be imputed to the State when the private citizen was in some way "instigated, encouraged, counseled, directed, or controlled" by the State or its officers. State v. Agee, 15 Wn. App. 709, 713-14, 552 P.2d 1084, 1087 (1976); see also, State v. Gonzales, 24 Wn. App. 437, 439, 604 P.2d 168 (1979) (warrantless search). Officer Sandin made Wahbi an agent of the State by directing him to attempt to make a copy of the video

rather than taking the hard drive with him to preserve the evidence. Consequently, the destruction of the video can be imputed to the State.

In summary, Densmore's due process rights to a fair trial were violated when the trial court denied his motion to suppress the testimony about a video that was destroyed due to the negligence of the State.

2. THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT DENSMORE'S IDENTITY AS THE PURPETRATOR OF THE CHARGED CRIMES.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. State v. Aver, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In this case, there is insufficient evidence to convince a rational trier of fact that Densmore was one of the men who burglarized the Celtic Bayou.

In the light most favorable to the State, the evidence of Densmore's identity as one of the burglars was, at best, attenuated.

Wahbi testified the three men on the surveillance video were the same three men he saw in his bar the night before. 3RP 419. The bartender and server also saw three men that night who gave them a “strange vibe.” 3RP 475, 495. These may or may not have been the same three men Wahbi said he saw— it is not clear from the testimony. According to the bartender, moreover, he was not certain Densmore was one of the men drinking in the bar; he was “similar” to him, but darker-skinned. 3RP 499-500, 502. The bartender was more certain the Bowmans were in the group of three he saw drinking at the bar. 3RP 500.

Both the bartender and the server saw three men sitting in a blue sedan in the parking lot at closing time, several hours before the alleged robbery occurred. 3RP 476, 497. Densmore owns a black sedan. 3RP 509. No one identified Densmore’s vehicle as the one they saw, or even of the same type.

Finally, Densmore had tools in his home that could have been used for a burglary, but the State did not prove these were the tools used at the Celtic Bayou. 3RP 509-519.

In total, even in the light most favorable to the State, there was not sufficient evidence presented to show that Densmore

committed burglary, malicious mischief and theft.<sup>2</sup> Therefore, the verdicts must be reversed.

D. CONCLUSION

The trial court violated Densmore's due process right to a fair trial by denying his motion to suppress the destroyed video. Moreover, there was insufficient evidence to prove Densmore was the man who committed the charged crimes. The convictions should be reversed.

DATED: March 7, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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<sup>2</sup> In fact, the evidence presented by the State at trial was so insufficient that the judge in the first trial barely overruled a half-time motion to dismiss, stating that the State's evidence provided only a "tenuous link" between Densmore and the crime. 2RP 312

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

STATE OF WASHINGTON/DSHS,            )  
  )  
  Respondent,            )  
  )  
  v.                                )  
  )  
JAMES DENSMORE,                        )  
  )  
  Appellant.                )

COA NO. 67793-4-1

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7<sup>TH</sup> DAY OF MARCH 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES DENSMORE  
DOC NO. 299573  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF MARCH 2012.

x *Patrick Mayovsky*

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