

ORIGINAL

Court of Appeals No. 35851-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent

v.

RICHARD JACKSON, Appellant

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY DEPUTY

PM 7-17-07

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KITSAP COUNTY

Cause No. 06-1-00594-3

BRIEF OF APPELLANT

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I.

Assignment Of Error

- A. **The Trial Court Erred When It Entered The Special Verdict.**
- B. **The Trial Court Erred When It Denied Mr. Jackson's Motion To Suppress Testimony Regarding Evidence Which Was Destroyed.**
- C. **The Trial Court Erred When It Refused To Give Defendant's Proposed Jury Instruction C.**

II.

Issues Pertaining To Assignment Of Error

- A. **Did The Trial Court Err When It Entered The Special Verdict On The School Zone Enhancement When Counsel Objected To The Amended Information, The Court Reserved Ruling On The Special Allegation, And The Special Allegation Was Crossed Out On The Amended Information?**
- B. **Did The Trial Court Err When It Denied Mr. Jackson's Motion To Suppress Testimony Concerning Evidence Allegedly Found When The State Destroyed That Evidence?**
- C. **Did The Trial Court Err When It Refused To Give Defendant's Proposed Jury Instruction C Regarding Destroyed Evidence?**

III.

Statement Of The Case

- A. Special Allegation – School Zone Enhancement

Richard Jackson was charged by information filed in the Superior Court for Kitsap County with one count of Possession of Ephedrine, Pseudoephedrine, or Pressurized Ammonia Gas with Intent to Manufacture Methamphetamine on April 18, 2006. CP 1. On August 22, 2006, the day of trial, the State moved to file a First Amended Information,

which added Count I Special Allegation – School, Bus Stop, or Other Protected Zone, and Count II Possession of a Controlled Substance [Methamphetamine]. CP 38

Defense counsel objected to the amended information concerning the special allegation, claiming discovery violations. VRP 3 August 22, 2006. At the time of the objection, the State had still not completed the measurements for the school zone enhancement nor provided the defense information concerning the enhancement. VRP 4. The trial court agreed that the State had violated discovery rules, but disagreed with the defendant's position that the appropriate remedy was to refuse the enhancement. The trial court decided to "split the baby" permitting the State the opportunity to get its measurements, and allowing defense counsel an opportunity to investigate afterwards. VRP 7. Additionally, the State was precluded from mentioning anything about the proximity to a school bus stop in opening Statement or by asking any questions concerning the distance until the measurements had been obtained and defense counsel had an opportunity to investigate. VRP 7.

Noting the defense objection to the Special Allegation, the court questioned Mr. Jackson concerning Count II of the amendment. Mr. Jackson waived reading and pleaded not guilty. VRP 9. Count I Special Allegation – School, bus stop, or other protected zone was crossed out on the First Amended Information. CP 38.

Once measurements had been obtained and defense counsel had an opportunity to interview the witness and investigate, on August 24, 2006 the court again addressed the enhancement issue. VRP 159. Jackson continued his objection to the enhancement due to the late discovery violation. The State argued that reasonable steps had been taken to

accommodate the defense, and the court permitted the State to present testimony and argument concerning the enhancement. VRP 160. The information was not amended again to include the enhancement.

B. Destruction of Evidence

On August 23, 2006, before the 3.5 hearing, defense counsel confirmed his suspicions that evidence the State intended to present testimony on had been destroyed. VRP 44. In fact, everything that was relevant to manufacture of methamphetamine had been destroyed, other than pseudoephedrine. Those items were allegedly found in a milk crate in Jackson's bedroom. Additional items found in the milk crate that were in no way related to manufacture of methamphetamine had also been destroyed. Jackson moved for suppression of any testimony regarding the destroyed items. VRP 45. The State presented to the court a photograph of the destroyed evidence. VRP 71. The State admitted that everything in the photograph was probably destroyed because none of it was available for review prior to the hearing. VRP 71. The destroyed items included tubing, a funnel, gloves, a mask, two bottles of an energy drink or iced tea, Red Devil Lye, a container holding an unknown fluid, batteries, and a rectangular box with the word Moen on it. VRP 71-72. These were the items that could be visually identified in the photograph. No samples were obtained. VRP 67. A destruction order was not obtained in accordance with local procedure and as required by RCW 69.50.511. VRP 69.

The State argued that the items were circumstantial evidence of intent and that it did not matter what was in the containers. "[T]here could have been coca cola or water in there, and it wouldn't make a difference because it goes to intent." VRP 73. The court

agreed that proper procedures had not been followed and was concerned that the evidence had been destroyed. However, the court stated the defense had failed to show how the defendant had been prejudiced. Moreover, the court found that the photograph sufficiently identified the items found in the milk crate. The court also determined that the critical inquiry was intent, which is always proved by circumstantial evidence. VRP 74.

Furthermore, the court stated that the suppression of any mention of the evidence would gut the State's case in presenting circumstantial evidence, and therefore denied the motion. VRP 75.

C. Jury Instruction

Because the court permitted the State to present testimony concerning evidence that had been destroyed, defense counsel proposed the following instruction: "If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." CP 37, Instruction C. The State objected to the instruction, claiming that the it was a comment on the evidence; that there was no evidence that the destroyed evidence was exculpatory; and that the instruction suggests the evidence destroyed was exculpatory. VRP 253. The State argued that the instruction was similar to the missing witness instruction, in which if no inference is permitted, the instruction cannot be given. The Court agreed with the State's assessment and denied the instruction. VRP 256.

IV.

Argument

A. The Trial Court Erred When It Entered The Special Verdict On The School Zone Enhancement, When The State Violated Discovery Rules, Mr. Jackson Was Not Arraigned On The Enhancement And The Enhancement Was Struck From The Amended Information.

This court has addressed the Kitsap County plea system in the past. In *State v. Bonisisio*, 92 Wn. App. 783; 964 P.2d 1222, review denied, 137 Wn.2d 1224 (1999), this Court rejected a claim of prosecutorial vindictiveness based upon a showing that the information was amended to add more serious charges on the eve of trial. Regarding the late amendment of the information, coupled with the denial of Bonisisio's continuance, the Court said:

Here, although Bonisisio did not receive the amended information until approximately one week before trial, he did not claim that the charging document was untimely or otherwise prejudicial. Nor did he seek to sever any of the charges or explain what information he sought to obtain through additional discovery. Further he had been aware of the possibility of the State filing those charges for a considerable time.

Bonisisio at 793.

There are significant differences between Mr. Jackson's case and *Bonisisio*. First, Mr. Jackson objected to the amended information based on lack of probable cause and discovery violations. Second, although Mr. Jackson may have been aware of the potential holdback charge for a considerable time, no discovery concerning the hold back charge had been provided or even gathered by the State. In *Bonisisio*, implicit in the analysis is that the defendant had been provided full and complete discovery on all the uncharged burglaries long before trial. Conversely, Mr. Jackson did not have that opportunity until after the trial began because discovery relevant to the enhancement had not been provided

or obtained. The measurements confirming that the residence was within 1,000 feet of a school bus stop had not been obtained. The location of the school bus stop had not been identified. An anticipated witness was provided at the start of the trial. Defense counsel was unable to prepare a defense prior to trial concerning the enhancement. The trial court agreed that a discovery violation had occurred.

Two things must be shown before a court can require dismissal under CrR 8.3(b). First a defendant must show arbitrary action or governmental misconduct. *State v. Michielli*, 132 Wn.2d 229, 239; 937 P.2d 587 (1997). Government conduct, however, need not be of an evil or dishonest nature; simple mismanagement is sufficient. *Id.* at 240. Here, the State had not instructed officers to measure for the enhancement prior to the beginning of the trial and did not amend the charge until the morning of trial; the court did find that a violation occurred.

The second necessary element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting a defendant's right to a fair trial. Here, although the trial court found a discovery violation, the court decided the appropriate remedy was to permit the State to obtain the measurements, allow defense to have an investigator confirm the information, and allow for interview of the State's witness prior to testimony. This remedy prejudiced Jackson by requiring late investigation, delaying the trial, and increasing the potential sentence that Jackson faced should he not prevail at trial.

Furthermore, the amended information concerning the enhancement was not accepted by the court, as it crossed through the special allegation. There was no further arraignment or amendment to include the special allegation. Although testimony was

presented and a jury instruction given, a jury instruction is insufficient to cure a defective information. An information and jury instruction serve different purposes. See *State v. Vangerpen*, 125 Wn.2d 782, 787-88, 888 P.2d 1177 (1995). Without amendment of the charging documents the sufficiency of other sources of the elements of the crime, such as the jury instructions, the parties' closing arguments, a separate but similar count in the same information, and a discussion of the elements with the defendant's attorney, have all been rejected if the information itself does not include all essential elements of the crime. *State v. Courneya*, 132 Wn. App. 347, 354, 131 P.3d 343 (2006).

Here, when Mr. Jackson objected to the amendment, the court struck the school zone enhancement allegation from the information. Even though testimony was permitted, closing arguments presented, and a jury instruction given, that does not cure the fact that the special allegation was no longer part of the amended information.

Therefore, because the defendant was prejudiced by the discovery violation, and the court did not accept the amended information, it was error for the court to instruct the jury on the special allegation, and furthermore, error to permit an enhanced sentence based on the allegation.

B. The Trial Court Erred When It Denied Jackson's Motion To Suppress Testimony Concerning Evidence That Was Destroyed, Which Was The Entire Basis Of The Allegation Against Mr. Jackson.

The Fourteenth Amendment requires that criminal prosecutions conform with prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984). To comport with due process, the

prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense. See *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963); *Trombetta*, supra. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994).

Two Supreme Court cases, *Trombetta*, supra, and *Arizona v. Youngblood*, 488 U.S. 51, 102 L.Ed.2d 281, 109 S.Ct. 333 (1988), developed a test to determine whether the government's failure to preserve evidence significant to the defense violates a defendant's right to due process. It is clear that if the State has failed to preserve "material exculpatory evidence" criminal charges must be dismissed. Recognizing that the right to due process is limited, however, the Court has been unwilling to "impos[e] on the police undifferentiated and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58. A showing that the evidence might have exonerated the defendant is not enough. In order to be considered "material exculpatory evidence," the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Trombetta*, 467 U.S. at 489; *Wittenbarger*, 124 Wn.2d at 475.

Under the Fourteenth Amendment, failure to preserve "potentially useful" evidence does not constitute denial of due process unless a criminal defendant can show bad faith on the part of the State. *Youngblood*, 488 U.S. at 58; *Wittenbarger*, 124 Wn.2d at 477.

To determine if a failure to preserve exculpatory evidence amounts to a denial of due process, the appellate court will apply the standard set forth in *Youngblood*. *State v. Ortiz*, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992).

In *Youngblood*, the State negligently failed to preserve semen samples that were collected from the victim and the victim's clothing, and tests which could have exonerated the defendant were not performed. *Youngblood*, at 53-54. In reinstating the conviction, the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, at 58.

In *Ortiz*, the trial court found that despite the decay in semen samples taken from a victim's body which prevented testing for exculpatory evidence, "the State had handled the samples in the usual manner," reasonably and in good faith. The State had tested the samples, but the defense was unable to test them. The Court of Appeals found substantial evidence to support this finding. *Ortiz*, 119 Wn.2d at 302.

However, bad faith can be shown by the lack of compliance with established procedures. *Wittenbarger*, 124 Wn.2d at 477. Here, RCW 69.50.511 and established local procedures require that a destruction order be obtained through the courts before evidence thought to be hazardous is destroyed. A destruction order was not obtained for the evidence in this case. Moreover, all of the items in the milk crate were destroyed, whether hazardous or not. In fact, based on argument, none of the items in the milk crate were hazardous and should not have been destroyed. Furthermore, unlike in *Ortiz*, no samples

of any of the items in the crate were taken, and it is not even known what contents were in the containers.

There are really two issues here. First, while it appeared there were items in the crate which had nothing to do with the manufacture of methamphetamine, it was impossible to know exactly what contents in the crate may have been exculpatory because all contents of the milk crate were destroyed. It is impossible to know if these unidentified contents may have provided an explanation for the presence of items in the crate that the State claimed as being circumstantial evidence of intent to manufacture. Furthermore, because no samples were taken and it is not known what was in the containers in the crate, it is possible that this evidence could have proved to be exculpatory as well. If the evidence is shown to have been materially exculpatory, it must have been known prior to the destruction and there must be no other way to obtain comparable evidence. Here, because the defendant was not given the opportunity to examine the evidence and only photographs of the milk crate exist, which do show items not relevant to the manufacture of methamphetamine, the exculpatory value was apparent before destruction, and there was no other way to obtain the evidence. Therefore, the evidence should have been suppressed and the case should have been dismissed.

However, even if the lower standard of "potentially useful" is applied, Mr. Jackson was not required to show prejudice as the court determined. He was only required to show that there was bad faith on the part of the State. Here, the fact that some items clearly had nothing to do with intent to manufacture methamphetamine has some evidentiary value. Because the court found that proper procedures were not complied with, bad faith has been

shown. Therefore, the evidence should have been suppressed, and the case should have been dismissed.

Secondly, should the State be permitted to present testimony concerning evidence it argues proves intent when it destroyed all of the evidence? The court agreed that the State's case would be gutted if it were not permitted to present testimony concerning the items allegedly found in the crate. The photograph only showed containers. Whether there was any substance in those containers could not be ascertained from the photograph. All of the cases discussing the destruction of evidence deal with whether the evidence was exculpatory and therefore precluded a defense. However, in this case testimony concerning evidence that was destroyed by the State was permitted to make the State's case. Because this entire case was based on circumstantial evidence that no longer existed at the time of trial, this court should find that it was error to permit testimony concerning that evidence.

C. The Trial Court Erred When It Failed To Instruct The Jury On Inferences It Could Find From The State's Destruction Of Evidence.

“Jury instructions satisfy the fair trial requirement when, taken as a whole, they properly inform the jury of the law, are not misleading, and permit the parties to argue their theories of the case.” *State v. Morgan*, 123 Wn.App. 810, 814-15, 99 P.3d 411 (2004) (citing *State v. Kennard*, 101 Wn.App. 533, 536-37, 6 P.3d 38 (2000) (quoting *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999), review denied, 142 Wn.2d 1011, 16 P.3d 1267 (2000)). “When read as a whole, jury instructions must make the legal standard

‘manifestly apparent to the average juror.’” *State v. Bland*, 128 Wn.App. 511, 514, 116 P.2d 369 (1996).

Here, the State had the burden of proving beyond a reasonable doubt that Mr. Jackson intended to manufacture methamphetamine. The State’s entire case was based on circumstantial evidence. However, the circumstantial evidence the State relied on did not exist because it was destroyed. The State was permitted to prove its case without producing the circumstantial evidence it claimed existed.

When the court failed to suppress the evidence, providing no remedy to Mr. Jackson, defense counsel proposed the following jury instruction in order to obtain some remedy: “If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State’s interest.” The jury instruction proposed by the defendant was meant to hold the State to its burden, and to make that legal standard clear to the jury. Although counsel was permitted to question the State’s witness concerning the destroyed evidence, that testimony could not remedy the loss of the physical evidence.

In Justice Steven’s concurrence in *Youngblood*, a jury instruction substantially similar to the one proposed here was said to have turned the uncertainty of the destroyed evidence to the defendant’s advantage, and therefore the defendant was not prejudiced by the destruction of the evidence. Here, no remedy was permitted to Mr. Jackson for the State’s failure to preserve evidence. While the jury instruction may not have cured the defect, at a minimum it would have put the jury on notice that the State had a duty it failed

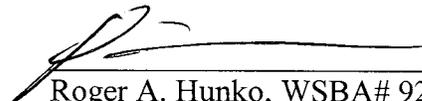
to keep. Therefore, it was error to exclude the jury instruction, and the case should be remanded.

V.

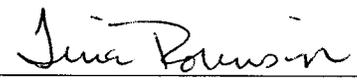
Conclusion

Because the trial court erred when it failed to suppress testimony concerning circumstantial evidence which was destroyed in bad faith by the State, the case should be dismissed. If the court does not agree, because the trial court impermissibly denied the defendant's proposed jury instruction, relieving the State of its burden, the case should be remanded for a new trial. Finally, because the trial court erred by permitting the jury to consider the special allegation, the special allegation should be dismissed and the case remanded for sentencing without the school zone enhancement.

Respectfully Submitted this 17th day of July, 2007.



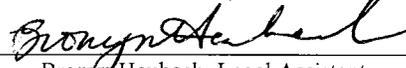
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CERTIFICATE OF SERVICE

I certify that on the 17th day of July, 2007, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated: Kitsap County Prosecutor's Office, 614 Division Street, MS-35, Port Orchard, WA 98366, via hand-delivery; Richard Jackson, Appellant, DOC# 302268, MICC, P.O. Box 881000, Steilacoom, WA 98388-1000, via U.S. Mail.

By: 

Bronwyn Heubach, Legal Assistant

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