

64029-1

64029-1

No. 64029-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES ERIC GROTH,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE'S FAILURE TO PRESERVE MATERIAL EXCULPATORY EVIDENCE VIOLATED MR. GROTH'S CONSTITUTIONAL RIGHT TO DUE PROCESS

Despite internal protocol and specific orders from the case detectives, almost all of the physical evidence and forensic test results in this 1975 murder was destroyed by the King County Sherriff's Department. Although a suspect in 1975, James Groth was not charged with the homicide until 2007, and on appeal he argues that the destruction of the physical evidence crime laboratory reports violated his constitutional right to due process of law. This Court should reject the State's argument that the destruction of evidence does not meet the tests established by the United States Supreme Court for due process violations based upon the destruction of evidence.

a. Mr. Groth's conviction must be reversed because the evidence destroyed by the police was material and exculpatory. Fundamental fairness requires the government to preserve evidence that is favorable to the defense and material to guilt or punishment, and due process is violated if the State fails to do so. Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102

L.Ed.2d 281 (1988); California v. Trombetta, 467 U.S. 479, 480, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Under Youngblood and Trombetta, “[i]t is clear that if the State has failed to preserve ‘material exculpatory evidence’ criminal charges must be dismissed.” State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). The State argues, however, that the evidence at issue in Mr. Groth’s case was not exculpatory. Brief of Respondent at 11-19.

For purposes of the Fourteenth Amendment, evidence is exculpatory if its exculpatory value was apparent before it was destroyed and if there is no reasonably available means by which the defendant would be able to obtain comparable evidence. Trombetta, 467 U.S. at 489. Here, Mr. Groth was one of two suspects being investigated by the King County Sheriff’s Department in 1975 for the murder of Diane Peterson. Mr. Groth was a friend of Ms. Peterson’s, lived two houses away from her, and had been at her home before she was killed. 8RP 546-47, 586-88, 591-92. The police interviewed on Mr. Groth three separate occasions, twice at the police station, and the last interview lasted several hours. 11RP 1044, 1073-74, 1078-80. Officers took photographs of Mr. Groth’s arms and boots. 11RP

1239-40; 12RP 1239-40, 1295-96; Ex. 151-52. They also investigated his whereabouts that evening. 11RP 1061-62, 1078. Thus, it is clear Mr. Groth was a suspect in 1975.

The detectives collected physical evidence and turned it over to the King County Sheriff's crime laboratory for testing. Kay Sweeney, then director of the laboratory, reported to the investigating detectives that he had performed the requested analysis on physical items from the crime scene.¹ 10RP 924, 933-34, 957-58. Mr. Sweeney's report, however, could not be located when Mr. Groth was charged with the crime.² 10RP 920, 933, 925-26, 938.

Importantly, after learning the results of Sweeney's laboratory analysis, the detectives did not charge Mr. Groth with the crime and stopped investigating him until many years later. If the forensic testing had linked Mr. Groth to Ms. Peterson's murder, however, the detectives would have charged him in 1975. Logically, the laboratory analysis was thus exculpatory.

¹ While the State now argues Sweeney may not have performed any forensic testing, Brief of Respondent at 16, the prosecutor made the point at trial that Sweeney met with Detective Hergesheimer in March 1975 and reported that he evaluated and examined all of the physical evidence as requested. 10RP 924-25, 932-34, 957-58.

² Sweeney testified there had been three copies of his report; the original would have been given to the lead detective, one copy was kept in the laboratory file, and one was usually kept in the master file. 9RP 937.

This case is markedly different than Trombetta, where the destroyed breath test sample had been tested before its destruction and implicated the defendant. Trombetta, 467 U.S. at 489. Here, the evidence was tested before its destruction and did not implicate Mr. Groth in the murder.

The evidence lost or destroyed by the State – virtually all of the physical evidence from the crime scene and autopsy and forensic analysis results – was material and showed Mr. Groth was not guilty of the murder. The State does not argue that Mr. Groth could have been able to obtain comparable evidence by reasonably available means, the second part of the Trombetta test. The destruction of the evidence therefore violated Mr. Groth's constitutional right to due process, and the prosecution should have been dismissed.

b. Mr. Groth's conviction must be reversed because the government destroyed the evidence in bad faith. Even if evidence destroyed by the government does not meet the material exculpatory evidence test, the defendant's constitutional right to due process is violated if the government loses or destroys potentially exculpatory evidence in bad faith. Youngblood, 488 U.S. at 58. The prosecutor argues the destruction of virtually all of the

physical evidence in this case was not in bad faith because the reason for the destructions is “unclear” and indicates the destruction may have been ordered because the sheriff’s department needed storage space. Brief of Respondent at 14 (referring only to a footnote in the prosecutor’s response memorandum, CP 262). The former director of the sheriff’s crime laboratory, however, testified that the amount of evidence in this case was not so great as to cause a storage problem. 10RP 942, 963. Moreover, the destruction was done in violation of department protocol and despite detective’s written requests that it be retained. CP 102, 104-05; 4RP 367; 11RP 1104; Ex. 130.

The prosecutor also suggests the destruction of evidence did not violate Mr. Groth’s due process rights because the lack of testing was to his advantage, citing Justice Stevens’ concurrence in Youngblood. Brief of Respondent at 13-14. This suggestion ignores two of the three factors upon which Justice Stevens based his opinion. While the concurrence is based in part upon the ability of the defense to use the absence of evidence to its advantage, the jury was also instructed in Youngblood that if it found the State had lost any evidence that was at issue in the case or had allowed the evidence to be destroyed, the jury could infer the evidence was

against the State. Youngblood, 488 U.S. at 59-60 (Stevens, J., concurring). “As a result, any uncertainty as to what the evidence might have proved was turned to the defendant’s advantage.” Id. at 60. Additionally, Justice Stevens found the fact that the jury did not draw the permissive inference found in that instruction showed the destroyed evidence was “immaterial.” Id. Here, in contrast, the jury was not given such a liberal permissive inference instruction, thus making Mr. Groth’s case easily distinguishable from the Youngblood concurrence.

c. Mr. Groth’s conviction must be reversed. Mr. Groth’s constitutional right to due process was violated when the State destroyed virtually all of the physical evidence and test results which were exculpatory because they had not led to the police to charge him with the crime. Additionally, if this Court believes the destroyed evidence was only potentially exculpatory, the destruction of the evidence was against police policies and the detective’s specific directions and thus in bad faith. His conviction must be reversed and dismissed. State v. Burden, 104 Wn.App. 507, 509, 17 P.3d 1211 (2001).

2. THE STATE'S FAILURE TO PRESERVE MATERIAL EVIDENCE VIOLATED MR. GROTH'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE WASHINGTON CONSTITUTION

Mr. Groth urges this Court join a number of states by independently interpreting our state constitution's due process clause to provide greater protections than those provided by the Fourteenth Amendment when the government loses or destroys evidence. The State does not respond to the substance of Mr. Groth's Gunwall analysis but states the issue was definitely determined two Washington Supreme Court decisions from the early 1990s – Wittenbarger, supra, and State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992).

The State's reliance upon Ortiz is misplaced. Only the four-justice plurality opinion adopted the Youngblood standard for evaluation when government destruction or loss of potentially exculpatory evidence violates the state constitution. Ortiz, 119 Wn.2d at 305. Justice Dolliver concurred in the result only, finding Ortiz's claim would fail under either the Youngblood test or the Vaster test utilized in this state prior to Youngblood. Id. at 315. Four justices in dissent would have independently interpreted Washington's due process clause and adopt the test previously

used in State v. Vaster, 99 Wn.2d 44, 659 P.2d 528 (1983). Id. at 315-325 (Utter, J., dissenting; Id. at 325 (Smith, J., joining dissent and also dissenting on separate issue). Thus, the State incorrectly cites Ortiz .

Mr. Groth makes a valid argument that Washington should independently interpret article I, section 3 in this situation. In Wittenbarger, the Court rejected a state constitutional analysis where law enforcement, following procedure established by the state toxicologist, failed to maintain maintenance and repair records for breath test machines. Wittenbarger, 124 Wn.2d at 472, 473-74, 482-83. At most the maintenance records could have been used to discredit the general reliability of the breath test machine. Id. at 476. It is not particularly remarkable that the Washington Supreme Court declined to find article I, section 3 required an independent analysis.

Here, however, law enforcement ignored its own protocols and specific requests by the investigating officers and destroyed almost all of the physical evidence and all forensic test results. Additionally, prior to its destruction, the police did not believe the evidence supported the conclusion that Mr. Groth was responsible for the crime. Mr. Groth's case presents facts that call for this Court

to evaluate whether Washington's due process clause calls for greater protection for defendants in this situation than does the federal due process clause. This Court should find article I, section 3's due process protections were violated when the police destroyed the evidence in this case and reverse his conviction.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING JOEL HARDIN TO TESTIFY ABOUT FOOTWEAR IMPRESSIONS AS AN EXPERT WITNESS

Joel Hardin, an experienced tracker of human beings, was permitted to offer his expert opinion that partial shoe prints he observed in crime scene photographs showed that two people, wearing shoes with treads similar to the shoes worn by Ms. Peterson and Mr. Groth, interacted at time of the murder. Mr. Hardin was not qualified as a scientific expert, but as a lay person with experience in the field of tracking. Mr. Groth argues on appeal that Mr. Hardin's testimony was misleading and should have been excluded.

The State first argues that Mr. Hardin's testimony was admissible because the Washington Supreme Court determined Mr. Hardin was qualified by experience to testify about what he observed at the crime scene in Ortiz, supra. Whether a lay witness

testifying from experience is admissible and helpful to the jury, however, depends upon the facts of the individual case. Ortiz does not provide support for the trial court's decision to permit Mr. Hardin to testify in Mr. Groth's case.

In Ortiz, Mr. Hardin actually went to the crime scene and followed "sign;" the Court therefore concluded Mr. Hardin's testimony was based upon his personal knowledge. Ortiz, 119 Wn.2d at 297-98, 309; 1RP 66-67. Here, Mr. Hardin only viewed crime scene photographs, which he acknowledged are incomplete and therefore could be misleading. 1RP 43-44; 2RP 137. Mr. Hardin claimed that his tracking program was the only one in the world that draws conclusions from photographs, and he was unable to say if he had ever testified about his conclusions from photographs. 2RP 89-91, 139-40. Just because Mr. Hardin had experience in tracking that qualified him to testify in Ortiz does not mean he had the experience necessary to testify about footwear comparisons from photographs as he did here.

Additionally, in Ortiz it does not appear that Mr. Hardin portrayed himself as anything other than a tracker able to interpret trail sign based upon on his experience. Id. at 309-10. Here, however, Mr. Hardin acted as if he were a forensic scientist,

producing a written report entitled, "Forensic Photo Examination," and relating that his field was based upon scientific principals. CP 103; Ex. 185 at 1; 2RP 123, 129. Mr. Hardin was thus a scientific expert disguised as a lay expert.

Finally, in finding Mr. Hardin's testimony was sufficiently reliable to be presented to the jury, the Ortiz Court was swayed by evidence corroborating Mr. Hardin's theories Ortiz, 119 Wn.2d at 390 (Hardin's testimony that perpetrator left farm by traveling through raspberry field corroborated by noises heard by neighbors). Here, no evidence corroborates Mr. Hardin's theory about the shoe patterns. In fact, an established forensic scientist stated he could not see what Mr. Hardin saw in the photographs, 3RP 321, and another opined there simply was not enough evidence to support Mr. Hardin's conclusions. Pretrial Ex. 10; 2RP 197, 201, 215-16; 14RP 1753-54, 1756-57, 1765-67, 1778. Mr. Groth's case is thus distinguishable from the use of Mr. Hardin's testimony in Ortiz, and this Court should reject the State's argument that Ortiz is controlling.

In response to Mr. Groth's argument that Mr. Hardin testified outside of his expertise, the State points out Mr. Hardin testified that he was not a footwear impression expert and his testimony

was based on his experience as a tracker. This argument misses the point. Even though the court admitted his testimony based only upon his experience, Mr. Hardin believed that he was utilizing scientific principles and methodology and relating his scientific knowledge,. CP 277-78; 1RP 16; 2RP 123.

Mr. Hardin, however, was far from scientific. In his written report he referred to the “victim’s shoes,” yet he admitted on cross-examination he had no idea if the partial shoe prints he saw came from Ms. Peterson’s shoes. CP 278; 2RP 120. The State even had to call another witness – Detective Kathy Decker – to explain tracking to the jury, 12 RP 1302-1328, 1336-50. Unlike Mr. Hardin, Detective Decker said that the field of tracking is extremely subjective and “more of an art than a science.” 12RP 1319-20. Thus, Mr. Hardin should have been offering his artistic opinion as to the contents of the photographs. Instead he offered forensic-like conclusions even though he was not a forensic scientist.

Mr. Hardin’s conclusions were also difficult to verify. Mr. Hardin claimed he was the only person in the world qualified to testify as he did, and he had no peers with whom he could discuss

his analysis and conclusions.³ 5/20/09RP 163-64. In fact, Mr. Hardin and Ms. Decker's testimony was remarkably similar to an advertisement for Hardin's tracking business. 1RP 21-39; 2RP 124, 128, 152-55; 12RP 1304-19; 5/20/09RP 33-38. While a forensic scientist with expertise in footwear comparison criticized Mr. Hardin's methods, the State discounts William Bodziak's opinion because he is not a tracker. Mr. Hardin drew conclusions from crime scene photographs while admitting he did not have all of the evidence in the case. 5/20/09RP 168-69. By testifying that the crime scene photographs showed only two shoes, one comparable to the victim's and one to the defendant's, Mr. Hardin was testifying outside his field. The trial court erred by admitting this unprofessional evidence.

The State provides no argument as to whether the error was harmless. Nor is there any reason to conclude the jury was not swayed by Mr. Hardin's testimony. While the jury was instructed it was not required to accept an expert witness's opinion, CP407, the jury had no way to evaluate Mr. Hardin's opinion when it was given the impression he was testifying concerning his area of expertise.

³ A simple internet search reveals competing tracking schools in the United States. See www.onpointtactical.com; www.trackingoperations.com; www.trackingschool.com.

See, State v. Jamerson, 153 N.J. 318, 342, 708 A.2d 1183 (1998).

This Court must reverse Mr. Mr. Groth's conviction and remand for a new trial.

4. THE STATE DID NOT PROVE BEYOND A
REASONABLE DOUBT THAT MR. GROTH
MURDERED MS. PETERSON

The State failed to present physical evidence connecting Mr. Groth to Ms. Peterson's murder other than his possession of boots with a popular tread pattern. The State argues other evidence fills this gap, citing Mr. Groth's presence at Ms. Peterson's home earlier on the evening of the murder, his friendship with Ms. Peterson, and his statements to friends and the police about her murder, including the detective's opinion that Mr. Groth did not strongly deny his culpability. Brief of Respondent at 28-36. The inferences the State draws from the circumstantial evidence are simply not enough to prove proof beyond a reasonable doubt that Mr. Groth killed Ms. Peterson, as required by due process. His conviction must be reversed and dismissed. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

5. THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT DENIED MR. GROTH A FAIR TRIAL

The deputy prosecutor committed misconduct in her closing argument by (1) misstating the burden of proof, (2) telling the jury it was required to give circumstantial and direct evidence equal weight, and (3) misinforming the jury concerning the missing evidence instruction, thus violating Mr. Groth's constitutional right to due process.

Mr. Groth first argues the prosecutor misstated the State's burden of proof beyond a reasonable doubt. The prosecutor told the jury they would have unanswered questions, but "unanswered question" do not "equal reasonable doubt." She also opined the case was like a jig saw puzzle. 5/28/09RP 77-78, 131. In its response brief, the State claims that the prosecutor's argument was benign because the unanswered questions she references were facts not germane to the elements of the crime.

While that may be true in the State's initial closing argument, this is not true in rebuttal. There the deputy prosecutor's discussion of unanswered questions and unfinished jigsaw puzzles is linked her discussion of the evidence that showed Mr. Groth was guilty and her argument that the jury could convict without an eye

witness. 5/28/09RP 130-31. Not only was the unanswered questions comment improper, instructing the jury to view the case as a jig saw puzzle trivializes the burden of proof beyond a reasonable doubt and suggests the jury should convict. State v. Johnson, ___ Wn.App. ___, 243 P.3d 936, 940 (2010). The prosecutor's argument was thus improper.

The prosecutor also gave the jury an incorrect explanation of the circumstantial evidence instruction, telling the jury that the instruction meant they were to give equal weight to circumstantial and direct evidence. 5/28/09RP 47. The circumstantial evidence in this case permitted the jury to give whatever weight it saw fit to any of the evidence, whether it was direct or circumstantial. CP 406. The State now claims the prosecutor's argument was proper because circumstantial and direct evidence carry "equal weight." Brief of Respondent at 42, (quoting State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004)).

In fact, circumstantial evidence instruction is designed to give the jury the latitude to give whatever weight it wishes to the evidence given the circumstances because circumstantial evidence is no longer considered inferior to direct evidence. See State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); State v. Gosby,

85 Wn.2d 758, 766-67, 539 P.2d 680 (1975) (abandoning rule that circumstantial evidence less reliable than direct evidence). The prosecutor's argument that the two kinds of evidence are necessarily equal thus misleads the jurors, who are required to make an independent determination of what weight to give the various kinds of evidence in the case.

Finally, the deputy prosecuting attorney told the jury it could only infer the destroyed evidence would not have favored the State only if there was "evidence" that the destruction of the evidence was "malicious" or done to hide the evidence. 5/28/09RP 78-79. The instruction, however, permits the jury to infer the missing evidence would not favor the government if it believed the inference was warranted under the circumstances of the case. CP 408. The prosecutor's argument thus misstates the court's instruction in a manner that favored the State.

As a representative of the State, the prosecuting attorney may not misstate the burden of proof or the court's instructions during closing argument. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); Johnson, 243 P.3d at 939-40. The argument here was flagrant and ill-intentioned because "a misstatement about the law and the presumption of innocence due

a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights."

Johnson, 243 P.3d at 940-41 (quoting State v. Bennett, 161 Wn.App. 303, 315, 165 P.2d 1241 (2007), aff'd 161 Wn.2d 303 (2007); State v. Anderson, 153 Wn.App. 417, 432, 220 P.3d 1273 (2009), rev. denied, ___ Wn.2d ___ (11/2/10)). Mr. Groth's conviction should therefore be reversed. Id. at 941.

6. MR. GROTH'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS ATTORNEY DID NOT PRESENT ANY INFORMATION OR ARGUMENT AT SENTENCING

Mr. Groth was convicted of a murder that occurred in 1975, when he was a minor, and the trial court invited the parties to inform her about the sentencing law applicable at the time, including those available in juvenile court. 17RP 1850-51. Because his attorney did not provide any such information for the court and did not even argue for a particular sentence, Mr. Groth argues on appeal his attorney failed to perform her duties in violation of his constitutional right to counsel. The State counters that defense counsel's failure to advocate for her client was an

organized strategy endorsed by Mr. Groth to demonstrate his innocence.

The State's argument demonstrates an ignorance of defense counsel's ethical obligations. Defense counsel's ethical responsibility to advocate for her client does not disappear at sentencing, and certainly cannot be suspended based upon the attorney's individual belief that the client was justly or unjustly convicted. American Bar Association, ABA Standards for Criminal Justice Prosecution and Defense Functions Standards 4-4.1, 4-8.1 (1993). Nor does the passage quoted by the State, where Mr. Groth declined to exercise his right to allocution, demonstrate he agreed with his lawyer's "strategy." 18RP 1871-72. By failing to make any statement on behalf of her client at sentencing on the ground that he was innocent, defense counsel failed to perform as counsel. Prejudice in this case is presumed, and Mr. Groth's sentence must be reversed.⁴ United States v. Cronin, 466 U.S. 648, 658-62, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); In re Personal Restraint of Davis, 152 Wn.2d 647, 674, 101 P.3d 1 (2004).

⁴ Mr. Groth also pointed to specific prejudice from his counsel's decision not to advocate on his behalf. Brief of Appellant at 74-75. He was ordered to pay a victim penalty assessment that could not have been ordered in 1976. CP 465; RCW 7.68.035 (enacted in 1977)

E. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Mr. Groth's conviction for second degree murder must be reversed and dismissed because the State's destruction of a substantial portion of the physical evidence and crime lab test results violated his constitutional right to due process under the federal and/or state constitutions. Dismissal is also required because the State failed to prove every element of the crime beyond a reasonable doubt.

In the addition, Mr. Groth's conviction should be reversed and remanded for a new trial because the trial court improperly permitted testimony from a tracker concerning footwear impression comparisons and because the prosecutor committed misconduct in closing argument. In the alternative, this Court should vacate Mr. Groth's sentence and remand for a new sentencing hearing with competent counsel and/or to vacate the victim penalty assessment.

DATED this 2nd day of February 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64029-1-I
v.)	
)	
JAMES GROTH,)	
)	
Appellant.)	

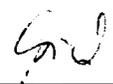
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