No. 47030-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

CHARLES S. LONGSHORE, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge

No. 12-1-00219-3

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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Shelton, WA 98584
360-427-9670 ext. 417

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The record does not support Longshore's assertions that testimony allowed by the prosecutor was false.

2. The trial court did not err by providing a WPIC 6.05 Accomplice Testimony instruction to the jury in this case, because a primary part of the evidence against Longshore was the testimony of Robert Raphael, who was an accomplice and who testified against Longshore in satisfaction of the terms of a plea bargain. On these facts, the trial court would have erred had it not give the WPIC 6.05 instruction.

3. The trial court did not err by not dismissing the case based upon Longshore's assertion that the State failed to preserve material, exculpatory evidence, because the materialioty of the evidence was speculative, at best, and there was no showing that the evidence was exculpatory.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, with exception of contradictory and additional facts as offered below to develop the State's arguments, the State accepts Longshore's statement of facts. RAP 10.3(b).

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

C. ARGUMENT

1. The record does not support Longshore's assertions that testimony allowed by the prosecutor was false.

Longshore contends that the prosecutor in this case committed misconduct by calling Longshore's codefendant, Robert Raphael, as a witness at trial. Raphael testified that he was present when Longshore intentionally murdered Tyler Drake and Anitrea Taber by shooting them with a pistol. Longshore's contention of prosecutorial misconduct is premised upon his further assertion that the prosecutor knowingly presented false testimony by calling Raphael as a witness.

In support of his contentions, Longshore argues that the prosecutor called Raphael as a witness "[i]n spite of the facts that the [S]tate did not believe any of Mr. Raphael's protestations of innocence." Br. of Appellant at 28. Longshore does not provide a citation to the record to support this assertion. *Id.* Also, without providing a citation to the record, Longshore asserts that the State originally charged Raphael with aggravated first degree murder, but this assertin is incorrect (the State originally charged Raphael with twp counts of murder in the first degree with firearm enhancements). Longshore enumerates five items of purportedly false testimony that the prosecutor purportedly elicited from Raphael, as follows:

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

> This evidence included Mr. Raphael's claims that (1) he did not solicit the defendant to act as a "tax collector," (2) that he did not know that the defendant had the pistol on the last occasion that he entered house at 213 Harvard Street, (3) that he did not intend any harm to either Anitrea Taber and Tyler Drake, (4) that he in no way solicited the defendant's action, and (5) that he was shocked when the defendant committed these crimes.

Br. of Appellant at 28. Again, Longshore does not provide citations to the record to support these assertions. The State will address each of these five factual assertions separately, as follows.

First, it is probably irrelevant on the facts of this case whether Raphael solicited Longshore to commit these murders. Solicitation could be one means of establishing Raphael's accomplice liability (or might be important to a charge of conspiracy, if there were such a charge in this case), but solicitation is not an essential element of accomplice liability, as accomplice liability can also be established when an accomplice encourages another person to commit the crime or when he or she "[a]ids or agrees to aid such other person in planning or committing" the crime. RCW 9A.08.020(3). Here, as identified throughout the State's brief, there was ample evidence that Raphael encouraged and aided Longshore to commit a robbery, burglary, or intimidation in order to collect a drug debt for Raphael. Even if Raphael did not intend that Longshore murder Mr. Drake and Ms. Tabor, he was nevertheless an accomplice.

Raphael testified that he and Longshore discussed the fact that Longshore wanted to earn money for drugs by doing tax work for him. RP XI 1806, 1809-10, 1822, 1867. As compensation, Longshore wanted to keep half of whatever he was able to collect for Raphael. RP XI 1822. Raphael testified that he told Longshore that he would not pay him half. RP XI 1822. Thus, they had no firm agreement in regards to payment. RP XI 1822, 1869. Raphael testified that the compensation rate was left open-ended, but that if Longshore had succeeded in collecting some money for him, Raphael would have payed him by giving him drugs or money or something. RP XI 1900-02.

Raphael further testified that he and Longshore went together to the house where Anitrea Taber and Tyler Drake were waiting to buy drugs from Raphael, and that once there, Raphael quietly informed Longshore that Ms. Taber was "the one" who owned him money. RP XI 1824. When the prosecutor asked Raphael why he told Longshore that Ms. Taber was "the one" who owed him money, Raphael testified that it was "[b]ecause if he was going to do any collecting for me that, you know, that would be the person to collect from." RP XI 1825; RP XI 1896. Later in the evening, Longshore murdered Ms. Taber by shooting her with a pistol and then murdered Mr. Drake to eliminate him as a witness. RP XI 1836-39.

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From these facts, Longshore contends that the prosecutor elicited false testimony because, he contends, he did not solicit Longshore to do tax work for him. Br. of Appellant at 28. But again, it is not necessary that Raphael solicited Longshore to do tax work in order to constitute accomplice liability. RCW 9A.08.020. Nor is it important whether Longshore solicited Raphael. *Id.* Nor is an agreement between Longshore and Raphael necessary to establish Raphael's accomplice liability. *Id.*

Longshore next contends, as item (2), that the prosecutor knowingly elicited false testimony that Raphael "did not know that the defendant had the pistol on the last occasion that he entered house at 213 Harvard Street[.]" Br. of Appellant at 28. But this assertion of fact bears little relevance to Raphael's accomplice liability and bears no relevance to Longshore's culpability for his own crimes of conviction. Still more, there is no evidence in the record from which it can be fairly asserted that the statement is untrue.

Longshore next asserts, as item (3), that the prosecutor knowingly elicited false testimony that Raphael "did not intend any harm of either Anitrea Taber [or] Tyler Drake[.]" Br. of Appellant at 28. But this assertion of fact is irrelevant to Longshore's crimes of conviction, and still more, there is no citation to the record to support any finding that the statement is conclusively untrue. The totality of the facts and

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circumstances show that it is most likely that Raphael merely hoped that Longshore would intimidate Ms. Taber into repaying her debt (thus committing what would by law constitute a robbery), and that he was surprised when Longshore instead murdered Ms. Taber and Mr. Drake.

Longshore next asserts, as item (4), that the prosecutor knowingly elicited false testimony that Raphael "in no way solicited the defendant's action[.]" Br. of Appellant at 28. But as discussed above, solicitation is irrelevant to this case. Still more, there is no citation to the record to sustain a conclusive finding that the statement is untrue. Certainly, there is no citation to suggest that Raphael solicited Longshore to murder Ms. Taber and Mr. Drake. And, it is at most in dispute as to whether Longshore solicited Raphael for the opportunity to do tax work for him or whether, to the contrary, it was Raphael who solicited Longshore to do tax work. Still more, as argued above, the element of solicitation is irrelevant to either defendant's crimes of conviction.

Finally, Longshore last asserts, as item (5), that the prosecutor knowingly elicited false testimony that Raphael "was shocked when [Longshore] committed these crimes." Br. of Appellant at 28. But again, Longshore has not provided any reason to doubt the truth of this

statement. In fact, it appears from review of Raphael's entire testimony he was in fact surprised that Longshore murdered Ms. Tabor and Mr. Drake.

Even though Longshore has not shown any false testimony, he nevertheless asserts an inference of falsity based partly on the fact that the State offered, and Raphael accepted, a plea bargain in exchange for his trial testimony. Br. of Appellant at 28. But this plea agreement was fully disclosed to Longshore, the court, and the jury. RP XI 1793-95, 1861-62; Ex. 200. Longshore cites *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), to support his legal assertions on this issue. But *Giglio* is dissimilar to the instant case because in *Giglio* the prosecutor allowed false testimony by allowing a witness to testify falsely that he had not received a plea bargain in exchange for his testimony, and in *Giglio* the prosecutor then repeated the claim in closing arguments. *Id.* at 150-52. These facts do not resemble the facts of the instant case.

Longshore next asserts that the prosecutor in closing arguments "explicitly stated that Mr. Raphael had given false testimony in this case." Br. of Appellant at 28. Longshore then provides quoted language from the prosecutor's rebuttal closing argument, but nowhere in the quoted language does the prosecutor explicitly state what Longshore contends, nor does the prosecutor implicitly make any such statement.

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In summary, Longshore alleges that his due process rights were violated because, he asserts, the prosecutor committed misconduct by knowingly allowing false testimony. But the record does not support Longshore's assertion. "[T]he right to a fair trial includes the exclusion of perjured testimony." *State v. Statler*, 160 Wn. App. 622, 641, 248 P.3d 165 (2011). But here, as in *Statler*, "no perjury has been established." *Id.* "Moreover," as in *Statler*, "credibility determinations are left for the trier of fact." *Id.*, citing *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Furthermore, as in *Statler*, the court in the instant case "instructed the jury to use caution when relying on testimony from an accomplice." *Statler* at 641; CP 109 (Jury Instruction No. 10). As was the witness in *Statler*, the witness here, Raphael, "testified to his version of the events and was tested on cross examination[;]" and, "[t]he jury had to determine whether there was perjured testimony, and apparently rejected the defense arguments." *Id.* at 641-42; *see also*, *State v. Larson*, 160 Wn. App. 577, 594-95, 249 P.3d 669 (2011).

In conclusion, the State contends that Longshore's assertion of prosecutorial misconduct on these facts is unsupported by the record and is contrary to controlling caselaw.

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2. The trial court did not err by providing a WPIC 6.05 Accomplice Testimony instruction to the jury in this case, because a primary part of the evidence against Longshore was the testimony of Robert Raphael, who was an accomplice and who testified against Longshore in satisfaction of the terms of a plea bargain. On these facts, the trial court would have erred had it not give the WPIC 6.05 instruction.

Longshore asserts error based upon the trial court's decision to provide to the jury instruction based on WPIC 6.05 (Testimony of an Accomplice) and WPIC 10.51 (Accomplice – Definition). Br. of Appellant at 30-38. To support his arguments, Longshore presents arguments that suggest that he was an accomplice to Raphael, or that they were accomplices to each other, but that there was insufficient evidence to establish that either of them were accomplices.

In response, the State points out that the prosecutor did not charge Longshore as an accomplice. CP 754-55 (Information). Nor was the jury instructed that it could find Longshore guilty as an accomplice. CP 97-126 (Court's Instructions to the Jury). When the parties addressed the question of jury instructions with the court, the prosecutor specifically stated that the State was not alleging accomplice liability against Longshore. RP XIV 2226-27. Longshore asserts that "the [S]tate proposed an accomplice instruction so it could argue that both [Longshore] and Mr. Raphael were guilty of the crimes charged because

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

they both acted as accomplices to each other and both acted with the same intent to cause the deaths of Anitrea Taber and Tyler Drake." Br. of Appellant at 36. In response, the State contends that the record does not support Longshore's assertion on this point.

Instead, the record shows that the prosecutor specifically did not assert that Longshore was an accomplice in regards to the crimes for which Longshore was charged and convicted – two counts of aggravated first-degree murder. RP XIV 2226-27; CP 90-94, 754-755. To the contrary, when explaining that he was not alleging accomplice liability against Longshore, the prosecutor acknowledged that theoretically Longshore could arguably be an accomplice to uncharged crimes (such as burglary, intimidation, assault, or robbery), but that he was charged only with aggravated murder in the first degree, for which he acted alone. RP XIV 2226-27.

However, Raphael was nevertheless an accomplice to felony crimes that involved Longshore, because he encouraged or aided Longshore to intimidate Ms. Tabor and to extort a payment from her. RP XI 1806-07, 1821-25, 1867-69. The evidence does not show Raphael knew or expected that Longshore would murder Ms. Taber or that he would murder Mr. Drake to cover up the crime. Still, because Raphael

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PO Box 639
Shelton, WA 98584
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was an accomplice and because he offered testimony against Longshore, the trial court gave the WPIC 6.05, Testimony of Accomplice, jury instruction. RP XI 2220-23, 2223, 2239-40; CP 109 (Jury Instruction No. 10). Then, because the court gave WPIC 6.05, it then gave WPIC 10.51 (Accomplice – Definition). RP XI 2239-40, 2333; CP 110 (Jury Instruction No. 11).

Contrary to Longshore's assertions, the evidence against him in this case consisted of more than merely Raphael's testimony. Other evidence included the testimony of Tammy Aust (to whom Longshore admitted having committed the murders) (RP XI 1929-35), Longshore's flight (indicating consciousness of guilt) (RP VIII 1326-57; RP XIII 2127-28), and Longshore's efforts to dispose of the murder weapon (RP XI 1939-41, 1956-58).

Thus, there was substantial corroborating evidence in this case other than Raphael's testimony. Even when substantial corroborating evidence exists, however, it is always the better practice for the trial court to give the cautionary instruction embodied at WPIC 6.05 whenever accomplice testimony is introduced. *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584, 588 (1984) *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

3. The trial court did not err by not dismissing the case based upon Longshore's assertion that the State failed to preserve material, exculpatory evidence, because the materialioty of the evidence was speculative, at best, and there was no showing that the evidence was exculpatory.

Here, Longshore contends that the trial court erred by not dismissing the case based on Longshore's assertion that the State failed to preserve material, exculpatory evidence. Br. of Appellant at 40-42. Longshore's contention is based upon his assertion that officers at the Mason County jail laundered the clothes that Raphael was wearing when he was booked into the jail after being arrested for his involvement in the murders that Longshore committed. *Id.*

It is undisputed and well-settled law that the prosecution has a duty to disclose "material exculpatory evidence" and a related duty to "preserve such evidence for use by the defense." *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994).

The State's failure to disclose or preserve material exculpatory evidence, if the failure prejudices the due process rights of the accused, will result in dismissal of criminal charge. *Wittenbarger*, 124 Wn.2d at 475 ("It is clear that if the State has failed to preserve "material

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PO Box 639
Shelton, WA 98584
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exculpatory evidence" criminal charges must be dismissed"). However, there is a clear and important distinction between "material exculpatory evidence" and "potentially useful evidence." Recognizing that the right to due process is limited, however, the Court has been unwilling to "impos[e] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

A showing that the evidence might have exonerated the defendant is not enough. In order to be considered "material exculpatory evidence", the evidence must possess *both* 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. *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). *Wittenbarger*, 124 Wn.2d, 475.

A due process violation will only be found if the State (1) destroyed or otherwise failed to preserve material exculpatory evidence, or (2) in bad faith destroyed or otherwise failed to preserve potentially useful evidence.

Contrary to the arguments advanced by the defendant, the evidence at issue here falls, at best, into the "potentially useful" category. Nothing about Raphael's clothing or trace amounts of *potential* DNA material is material or exculpatory on its face. Unlike material exculpatory evidence, dismissal in a case where the State allegedly fails to preserve potentially useful evidence is only warranted if the defendant can prove that the State acted in bad faith. *State v. Wittenbarger* at 477. As explained by the Washington Supreme Court, there is no due process violation absent bad faith if the State fails to preserve "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *State v. Lord*, 117 Wn.2d 829, 868, 822 P.2d 177 (1991). *See also, State v. Smith*, 130 Wn.2d 215, 225, 922 P.2d 811 (1996) (unless the police act in bad faith, there is no denial of due process in failing to preserve potentially useful evidence that is not materially exculpatory).

"[The] dismissal of a criminal prosecution in the furtherance of justice is an extraordinary remedy," *State v. Cantrell*, 111 Wn.2d 385, 388, 758 P.2d 1 (1988), and consequently the defendant bears a heavy burden to prove that the State violated his due process rights by acting in

bad faith. Absent a showing of bad faith, there is no due process violation in this case. *Wittenbarger* at 477.

The cases in this area of Washington law do little to shed light on what it means for the State to act in "bad faith" in this context. Although failure to follow standard procedures may be useful in determining bad faith, even such a failure alone is not sufficient for a showing of bad faith. *See*, *United States v. Elliott*, 83 F.Supp.2d 637, 647 (E.D. Va. 1999). Rather, as held by the court in *Elliot*, failure to follow standard procedures is merely probative of bad faith. *Id.* That court went on to hold that "the negligent destruction of evidence occasioned by a failure to comply with controlling authority will not give rise to a finding of bad faith." *Id.*

In *State v. Sizemore*, the court dealt with the issue of bad faith on the part of the prosecution. *State v. Sizemore*, 48 Wn. App. 835, 741 P.2d 572 (1987). The issue involved in that case was whether the deputy prosecuting attorney acted in bad faith in charging a defendant with hit-and-run. *Id.* at 837-37. The court there defined bad faith as "actual or constructive fraud or a neglect or refusal to fulfill some duty ... not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *Sizemore*, 48 Wn. App. at 837 ed. 1979) (internal quotation marks omitted).

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

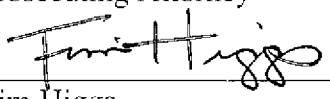
Here, Longshore has not shown that the potential evidence was material or that exculpatory, and he has not shown that the State acted in bad faith when the jail laundered Raphael's clothes. Accordingly, the State contends, the trial court did not err when it denied Longshore's motion to dismiss.

D. CONCLUSION

For the reasons argued above, the State asks this Court to deny Longshore's appeal and affirm his convictions.

DATED: February 24, 2016.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

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