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Supreme Court No. 95852-1
COA 75503-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOEL EDWARD PAYNE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

No. 14-1-05192-8 KNT

The Honorable Leroy McCullough

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Joel Payne was the appellant in Court of Appeals No. 75503-0-I.

B. COURT OF APPEALS DECISION

The Court of Appeals rejected Mr. Payne's arguments that the Due Process clause of the Fourteenth Amendment required dismissal of the information with prejudice, because the police, in "bad faith," allowed potentially useful evidence to be lost or destroyed. Decision of March 26, 2018 (Appendix A); Denial of Motion to Reconsider (Appendix B).

C. ISSUES PRESENTED ON REVIEW

1. On de novo review, did the trial court err in denying Mr. Payne's pre-trial motion to dismiss for violation of Due Process under the Fourteenth Amendment,[1] where the Tukwila police, deciding for itself that its investigation showed that Mr. Payne had not acted in self-defense, allowed potentially useful evidence to be destroyed days after the crime by giving the complaining witness Mr. Atkins his "signet ring" from the evidence locker, where it could have been tested for the defendant's blood and/or or DNA to show that Mr. Payne had been punched in the face and attacked by Atkins, and acted in self-defense, rather than committing an illegal assault?

2. Did the Court of Appeals erroneously intermingle the standards for loss of material exculpatory evidence and for potentially useful evidence

[1] The Fourteenth Amendment provides that Mr. Payne has the right to Due Process of Law. U.S. Const. amend. 14.

when it affirmed by reasoning that the detective in question did not "kn[o]w the ring was exculpatory when he released it."?

3. Although defense counsel did so as soon as she noted her Appearance and Request for Discovery, is the defendant, in order to make out a Due Process violation, required to show that he did "request" that the State not remove evidence from the evidence room and destroy it?

D. STATEMENT OF THE CASE

1. <u>Convictions</u>. The jury in Joel Payne's trial on charges including first degree assault rejected his claim of self-defense, and instead found that he unlawfully stabbed Randelle Atkins outside Southcenter Mall with a knife. CP 1-9; CP 26-28. He was sentenced to 168 months. CP 89-97; CP 154.

2. <u>Investigation and release of evidence to complainant</u>. Lead investigator, Detective Eric DeVries of the Tukwila Police Department, expressed his lack of belief in Mr. Payne's self-defense claim in the affidavit of probable cause. According to DeVries, Randelle Atkins stated that he was walking outside of the AT&T store at Southcenter Mall on a Friday evening, when he walked past Mr. Payne, who was sitting on the wooden bench in the courtyard area. CP 4. Mr. Payne allegedly yelled out to Atkins, "Hey, are you the Nigger who took my books yesterday?" CP 4. Mr. Atkins told Payne that he did not know him and told him to leave him alone, but, he alleged, Mr. Payne approached and began swinging at him, and hit him hard

in the chest area. CP 5. After running from the altercation, Atkins stated he realized he had been stabbed by something in his chest. CP 5-6.

When arrested, Payne had "bruises, a swollen eye, and was bleeding from the mouth." CP 5. However, DeVries decided that these injuries were *pre-existing*, and opined that there was no evidence Atkins hit Payne:

> Witnesses did not report seeing Atkins land any punches on Payne. A later check of Atkins' hands at the hospital also revealed no injuries indicating that Atkins had not been in any significant physical altercation consistent with Payne's injuries. Based on the fact that Payne already had swelling and bruising on his face and the fact that he had his face covered with a mask, it's reasonable to assume the injuries were pre-existing from a different altercation or incident.

CP 5. On January 28 at a pre-trial hearing, Mr. Payne argued that the detective acted in bad faith by removing the collected evidence of Mr. Atkins' signet ring from the evidence locker, and handing it over to the trial witness -- the accusing party Mr. Atkins himself – a mere several weeks after the incident. 1/28/16RP at 67-86; see 2/4/16RP at 224. The defense argued that Mr. Atkins' ring could not now be subjected to tests for the presence of the defendant's DNA, skin cells, or the like. This would support Mr. Payne's self-defense theory (required to be disproved by the prosecution), that Randelle Atkins did indeed strike and punch Mr. Payne, and Mr. Payne responded in self-defense. 1/28/16RP at 67-70. The State *conceded* that Detective Devries released the ring by giving it over to Atkins, an interested witness in a specific pending criminal trial, rather than pursuant to any

general policy regarding destruction of evidence, and that he did so without notice to the defense. 1/28/16RP at 68, 75-76.[2] 1/28/16RP at 83, 85-86. But the court denied the motion to dismiss, stating that "[t]he ring does not necessarily help the defense. It may be not exculpatory but it may be inculpatory. We don't know." 1/28/16RP at 85; see 1/28/16RP at 83 (stating that the evidence was not clearly exculpatory).[3]

> There's nothing here to suggest bad faith on the part of the police. There's nothing here to suggest that the ring had apparent exculpatory value according to State v. Donahue, 105 Wn. App. 67.

1/28/16RP at 85-86.[4]

3. Trial. At trial, Randelle Atkins continued to insist that he never hit the defendant, stating that his hands had been full with his shopping bag and his phone. 2/4/16RP at 204. He denied that he hit Mr. Payne in the face, including with the metal signet ring on his hand. 2/4/16RP at 198, 207;

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[2] State's exhibit 5 is a photograph of the signet ring taken before it was collected into evidence from where it was found lying on the ground under a bench. 2/4/16RP at 223-24; CP 189-93 (Exhibit list, State's exhibit 5). Mr. Atkins stated at trial that the police gave him the ring about three weeks after the incident when he was at the hospital. 2/4/16RP at 224. By the time of his trial testimony, Atkins did not have the ring. 2/4/16RP at 224.

[3] The prosecutor wrongly asserted at the motion hearing that Mr. Payne's case was governed by this more difficult Due Process test, where Mr. Payne must show that the evidence was completely exculpating on its face. 1/28/16RP at 75.

[4] See State v. Donahue, 105 Wn. App. 67, 78, 18 P.3d 608 (2001) (no bad faith where Washington detective obtained defendant's blood test results, showing alcohol level twice the legal limit, from Oregon hospital, but did not request the blood sample itself and hospital disposed of sample per standard procedure).

2/8/16RP at 253, 274. Atkins claimed that his signet ring did not fly off his hand, rather, he took it off. 2/4/16RP at 276-77.

Joel Payne testified that on the day of the incident, he was at the mall, and he became nervous because he saw a black male wearing dark glasses – Mr. Atkins – who he thought was the same person who had recently robbed him. 2/23/16RP at 783-89. The man followed Mr. Payne out of the sundry store at the mall, and when Mr. Payne turned around to face Atkins, he struck him twice, knocking Payne's belongings out of his hand. 2/23/16RP at 788-89. Mr. Payne tried to defend himself but Atkins hit him so hard he knocked the beanie Payne was wearing right off of his head. 2/23/16RP at 789. Mr. Payne was afraid the man was going to shoot him, and he pulled his pocketknife out of his pocket and said "Stop." 2/23/16RP at 790. But the man laughed, and swung at him again, so Mr. Payne "went like this." 2/23/16RP at 790. He realized he had hit the man in his chest, and he ran from the area, afraid. 2/23/16RP at 790-91.

E. ARGUMENT

Mr. Payne's right to Due Process was violated under Arizona v. Youngblood when Detective DeVries, knowing the importance of physical evidence in this self-defense case, released Atkins' signet ring to him before trial because he believed the defendant was guilty.

1. Review is warranted under RAP 13.4(b)(3). This Court may take review of a Court of Appeals decision if "a significant question of law under the Constitution of the State of Washington or of the United States is

involved[.]" RAP 13.4(b)(3). The Court of Appeals decision involves the application of the Fourteenth Amendment's doctrine of bad faith loss of potentially useful evidence. U.S. Const. amend. 14; Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); State v. Wittenbarger, 124 Wn.2d 467, 474-77, 477, 880 P.2d 517 (1994).

The Court of Appeals decision regarding what constitutes "bad faith" and determining that the conduct of a police officer in allowing potentially useful evidence, photographed, collected, catalogued and stored in the evidence locker, to be lost by giving it back to the complainant in a self-defense case where the defendant had blood in his face and the ring could show that the alleged victim in fact did strike the defendant (contrary to his denials of having done so), in this self-defense case, was error.

2. The Court of Appeals decision wrongly affirmed the trial court on this question of constitutional law involving the bad faith loss of potentially useful evidence, reviewed *de novo*.

(a). The standard of review is *de novo*. Due Process is violated, requiring dismissal of the criminal charges with prejudice, where the police allow evidence that is potentially useful to the defense to be lost or destroyed, if the police acted in "bad faith." U.S. Const. amend. 14; Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); State v. Wittenbarger, 124 Wn.2d 467, 474-77, 477, 880 P.2d 517 (1994).

The standard of review is de novo. State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001) (constitutional questions of whether evidence was useful or exculpatory, and whether the police acted in bad faith, are matters the appellate court reviews de novo) (citing United States v. Manning, 56 F.3d 1188, 1197-1198 (9th Cir.1995)).

(b). The police lost or destroyed evidence that was potentially useful to the defense. The court erroneously denied Mr. Payne's pre-trial motion, violating his Due Process rights. Whether the loss or destruction of evidence violates Due Process depends on the nature of the evidence, and the motivation of law enforcement. Wittenbarger, 124 Wn.2d at 475-77.

> Evidence is materially exculpatory only if it meets a two-fold test: (1) its exculpatory value must have been apparent before the evidence was destroyed, and (2) the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonably available means. Wittenbarger, 124 Wn.2d at 475, 880 P.2d 517[.] **If the evidence does not meet this test and is only "potentially useful" to the defense, failure to preserve the evidence [violates] due process [if] the criminal defendant can show bad faith on the part of the State**. Wittenbarger, 124 Wn.2d at 477, 880 P.2d 517 (citing Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)).

(Emphasis added.) State v. Burden, 104 Wn. App. at 512; accord State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183 (2011).

This was "potentially useful" evidence. The definition of potentially useful evidence is evidentiary material which, if not lost, "could have been subjected to tests, the results of which might have exonerated the defendant." Youngblood, 488 U.S. at 57; see also Wittenbarger, 124 Wn.2d at 477.

In contrast to potentially useful evidence, "material exculpatory evidence" is evidence that possesses "an exculpatory value that was apparent before it was destroyed." Wittenbarger, 124 Wn.2d at 475 (citing California v. Trombetta, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L Ed.2d 413 (1984)); see also Wittenbarger, at 475-77 (if evidence meets this *higher* category, the defendant need not show its loss was a result of bad faith).[5]

Here, the evidence was potentially useful and Mr. Payne must, and did, show bad faith. This was a case of assault, with an obvious defense to be raised by Mr. Payne of self-defense. CP 5 (DeVries affidavit, stating that witnesses reported no punching of defendant by victim, that victim had no injuries on his hands, and opining that defendant's facial bleeding was "pre-existing."). As the defense argued, Mr. Atkins' signet ring could have been tested for DNA or material that would refute the prosecution's claim that Payne did not act in self-defense. 1/28/16RP at 70-71; see CP 5.

The trial court erroneously dismissed the importance of the lost evidence by describing it as merely unknown as to whether it was inculpatory or exculpatory. 1/28/16RP at 85. But this description *satisfies* the Due Process standard associated with bad faith loss of evidence – i.e., *potentially*

[5] The terms potentially useful, potentially helpful, and potentially exculpatory are used interchangeably, describing the category of lost evidence that stands in contrast to evidence that on its face clearly would have exonerated the defendant. See, e.g., United States v. Donaldson, 915 F.2d 612, 614 (10th Cir.1990); United States v. Rodriguez, 917 F.2d 1286, 1291-92 (11th Cir.1990), vacated on other grounds by United States v. Rodriguez, 935 F.2d 194 (1991).

useful evidence. Youngblood, 488 U.S. at 57 (possible DNA evidence lost when victim's clothing was destroyed was potentially useful because it might, or might not, have shown the defendant was not the attacker).

What matters is that the evidence indeed could be helpful to the defense – if examined. For example, lost videotape evidence of a crime scene could be inculpatory, or exculpatory, not because of what it actually proves (it is lost, after all), but because, *if examined*, it may help exculpate the defendant. People v. Alvarez, 229 Cal. App. 4th 761, 774-75, 176 Cal. Rptr. 3d 890, 901 (2014), review denied, (Nov. 25, 2014) (lost video of parking lot at time of robbery is potentially exculpatory).

In this case, the State persisted from beginning to end with its case assertion that Atkins, as he said in his pre-trial interview, did not ever hit Mr. Payne. 1/28/16RP at 69-70, 75; CP 10-12 (defense pre-trial briefing); CP 172-88 (State's Trial Memo, at pp. 2-5). The signet ring was potentially useful under any standard. For example, potentially useful evidence -- requiring dismissal of the charges if bad faith is shown -- is the proper category for evidence such as a destroyed bag of alleged cocaine, as to which "an additional test might have provided the defendant with an opportunity to show that the police tests were mistaken." Illinois v. Fisher, 540 U.S. 544, 549, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004).

As Mr. Payne argued, the Signet ring could have been tested for material that would show that he indeed was struck, punched and assaulted by Mr. Atkins, contrary to Atkins' denials. 1/28/16RP at 68-70; CP 10-19, at 11-12 (Defense Trial Memorandum, at pp. 2-3) ("Mr. Payne has raised a claim of self-defense. The ring Mr. Atkins was wearing was potentially a key piece of evidence in his self-defense claim.").

(c). Releasing evidence to an interested party in a specific case is bad faith where it is contrary to any common sense police policy. Where evidence is mistakenly lost as a result of established police procedures, this is probative of good faith, which defeats a Youngblood claim. State v. Ortiz, 119 Wn.2d 294, 302, 303-04, 831 P.2d 1060 (1992) (no bad faith where evidence was unfortunately destroyed by handling in "the usual manner."); Donahue, supra, 105 Wn. App. at 78 (same). But failing to act in accord with evidence collection practices or reasonable treatment of evidence that any officer should be expected to follow, shows bad faith. United States v. Elliott, 83 F.Supp.2d 637, 645-47 (E.D.Va.1999).

This case does not involve evidence destroyed as a result of some general policy unrelated to the specific case at hand, or after a laboratory or agency mistakenly listed a pending case as closed. See, e.g., United States v. Picariello, 568 F.2d 222, 227-28 (1st Cir.1978) (even though case was still pending, no bad faith where dynamite evidence was destroyed because its

deterioration rendered it unsafe for storage and it had already been tested); United States v. Femia, 9 F.3d 990, 991-92, 995 (1st Cir.1993) (no bad faith where the evidence potentially useful to defendant was destroyed as part of another, closed case due to government's negligence in failing to realize that the evidence was cross-referenced); United States v. Garza, 435 F.3d 73, 75-76 (1st Cir.2005) (no bad faith where police destroyed tape recordings of controlled drug buys after mistakenly placing the case on list of old cases).

Unless it is an established, justified procedure of the Tukwila Police to give evidence in a specific pending criminal prosecution to an interested witness, the police conduct in this case is highly probative of bad faith, a determination the court must make under all of the circumstances. See generally United States v. Deaner, 1 F.3d 192, 200 (3rd Cir.1993) (failure to follow evidence procedures is probative of bad faith); United States v. Montgomery, 676 F.Supp.2d 1218, 1244 (D.Kan. 2009) (granting *habeas* petition where counsel failed to move to dismiss after government destroyed marijuana plants without photographing them, violating DEA practice).

The fact that Detective DeVries' release of the signet ring was in bad faith is supported by contrast to other Tukwila Police Department officer's understanding of the importance of a careful effort to secure and retain that evidence which could be important. 2/9/16RP at 453-55, 459, 461-63 (testimony of Sergeant Sanjay Prasad regarding team of officers collecting

physical evidence); State's exhibits 35, 36 (knives). In particular, Detective Ron Corrigan testified that he obtained DNA swabs from the accuser Mr. Atkins, and took photographs of Atkins' hands, because this would of course be evidence relevant to an assault trial arising out of the fight. 2/10/16RP at 619-26; State's exhibits 62-64 (photographs). The signet ring was originally found underneath the bench outside the mall, by Detective Reed Lancaster, listed as "evidence" in the police paperwork, and removed to the Department's evidence lockers. 2/10/16RP at 545-47; State's exhibit 5; 2/10/16RP at 570, 580-81, 597-98. Lancaster made sure to get a photograph of the ring where it lay on the ground, with an identifying evidence placard next to it. 2/10/16RP at 603-04. DeVries himself seemed to understand the importance of the physical evidence generally, at least when it came to the defendant's bloody knife, which he sent to the Washington State Patrol Crime Laboratory. 2/10/16RP at 533, 538, 544; Exhibit 53 (photo of knife).

But when it came to the *signet ring*, these practices of properly securing and retaining physical evidence were ignored. This is bad faith. Although the defense had not yet had a chance to request to test the ring before the detective released it, Mr. Payne had a reasonable expectation that the police do not simply give away collected evidence in a criminal case that has just been charged. 1/28/16RP at 84 (defense argument that it defies logic and prevents defense counsel from doing her job for police to release

collected evidence because of their unilateral decision that their investigation proves the defendant was the attacker).

For example, in the case of United States v. Cooper, 983 F.2d 928, 930-31 (9th Cir.1993), the defense hoped to examine seized laboratory equipment in order to determine if it was physically capable of manufacturing methamphetamine, as charged. The government implied to the defense that the equipment was being held as evidence, even though agents knew it would likely be destroyed in the normal course per environmental regulations. United States v. Cooper, 983 F.2d at 930. Pursuant to Youngblood, the Court ruled that the statements by the DEA agents to the defendant in a specific case that the equipment was "being held as evidence," showed bad faith, even though it was destroyed pursuant to general policies regarding dangerous drug materials. United States v. Cooper, 983 F.2d at 930-31.

(d). Detective DeVries allowed the evidence to be lost in bad faith where he knew the importance of any physical evidence bearing on self-defense, but had concluded that Mr. Payne was not acting in valid self-defense. The inquiry into whether potentially useful evidence was lost in bad faith must necessarily turn on exactly the foregoing -- the government's knowledge of the potentially exculpatory value of the evidence at the time it allowed it to be destroyed. Youngblood, 488 U.S. at 57; United States v. Zaragoza-Moreira, 780 F.3d 971, 978-79 (9th Cir.2015). Bad faith is shown

by police knowledge of the attendant circumstance of the required helpful nature of the evidence under either Trombetta (clearly exculpatory evidence) or the Youngblood standard. See Norman C. Bay, Old blood, bad blood, and Youngblood: Due Process, lost evidence, and the limits of bad faith, 86 Wash. U. L. Rev. 241, 289-91 (2008).

The importance of any physical evidence bearing on self-defense was apparent to Detective DeVries from the outset of the case. He correctly discerned that the issue was whether Mr. Payne was defending himself from a punching assault by Atkins. CP 5. Yet he released the ring. CP 4-5. Bad faith is shown by where evidence appears to have been destroyed with improper motivation. Groth, 163 Wn. App. at 559. Here, the record demonstrates that Detective Devries was aware of the importance of possible physical evidence of self-defense bearing on self-defense, but he *took a position on Mr. Payne's guilt* and then accordingly allowed evidence that potentially could refute guilt to be lost or destroyed. See CP 4-5 (affidavit of probable cause, noting self-defense issue but concluding that examination of Atkins' hands showed this was not a self-defense case, and rejecting the defendant's facial injuries as pre-existing).

The signet ring was evidence that other police officers had collected, photographed, and catalogued, and which might help exculpate Mr. Payne – and yet the lead detective released the ring to the accuser after deciding the

case himself. 1/28/16RP at 73, 84. This was bad faith. See United States v. Gallant, 25 F.3d 36, 39 and n. 2 (1st Cir. 1994) (bad faith is shown by all of the circumstances of the case including police knowledge and motivation).

The defense was never informed that the evidence was going to be removed from evidence hold, and certainly the police never sought defense agreement to releasing the evidence. 1/28/16RP at 68-71, 76; CP 11-12. Giving collected physical evidence to the accuser in a specific case, still pending, after demonstrating one's actual understanding of the importance of any potential physical evidence on the self-defense issue but taking a stance on that issue against the defendant, is not mere gross negligence; it is bad faith as shown by improper motivation.

Below, the State conceded that the police released the ring to Mr. Atkins, specifically that Detective Devries did so *unilaterally*, just as the defense complained. 1/28/16RP at 68, 75-76. The prosecution essentially admitted "bad faith" when it contended that it was proper for Detective DeVries to release the ring to Atkins because he assessed the case as not involving a successful self-defense claim. 1/28/16RP at 75-76.

(e). The Court of Appeals' affirmance, and its erroneous reliance on *Groth* to reason that there was no bad faith because the officer did not "kn[o]w the ring was exculpatory when he released it" and "believed the ring had no evidentiary value," confuses the applicable standard, turns

***Youngblood* on its head, and allows police to dispose of collected evidence by deciding for themselves whether the defendant is guilty.** Notably, the Court of Appeals relied on State v. Groth, supra, 163 Wn. App. at 554, 559. But in Groth, the evidence in question (numerous physical items and samples and the like) was from a 1975 murder case; it was destroyed in 1987, a time at which, some witnesses characterized it, the case was cold, whereas others stated the case was still technically open. Groth, 163 Wn. App. at 554-60 (also noting that a memorandum directed destruction of the evidence "per R.C.W. and department regulations"). The Court of Appeals tenably held that this was not a case where the officers who destroyed the evidence knew of "any . . . aspect" of the evidence that was exculpatory, nor was it a case where the evidence was destroyed with improper motivation. Groth, at 559-60. Groth in no way authorizes Detective DeVries to release and thereby lose physical evidence, in a just-opened case, that had been collected as part of the investigation of a case where officers so plainly understood that self-defense was the likely defense claim that they physically examined the victim's hands at the hospital, and later derided the defendant as the "first aggressor."

In addition, the Court of Appeals' affirmance by reasoning that there was no bad faith because the officer did not "kn[o]w the ring was exculpatory when he released it" confuses the applicable standard. See Decision, at p. 7. As argued in the Opening Brief, the police do not need to know that the

evidence is exculpatory for their loss or destruction of it to be bad faith. When dealing with the higher value class of lost evidence – that is, “material exculpatory evidence” known to be such – Due Process is violated by its loss, without regard to bad faith or good faith. State v. Wittenbarger, supra, 124 Wn.2d at 475; AOB, at pp. 13-14. As argued in the Opening Brief, bad faith as to potentially useful evidence (the lower-class type of evidence, compared to material exculpatory evidence) of course merely requires police knowledge that the evidence was *potentially* useful:

> The inquiry into whether potentially useful evidence was lost in bad faith must necessarily turn on exactly the foregoing -- the government’s knowledge of the potentially exculpatory value of the evidence at the time it allowed it to be destroyed. Youngblood, 488 U.S. at 57; United States v. Zaragoza-Moreira, 780 F.3d 971, 978-79 (9th Cir.2015). Bad faith is shown by police knowledge of the attendant circumstance of the required helpful nature of the evidence under either Trombetta (clearly exculpatory evidence) or the Youngblood standard. See Norman C. Bay, Old blood, bad blood, and Youngblood: Due Process, lost evidence, and the limits of bad faith, 86 Wash. U. L. Rev. 241, 289-91 (2008).

Opening Brief, at p. 21. That standard is plainly met here. The Court of Appeals erroneously intermingled the standards for loss of material exculpatory evidence and for potentially useful evidence when it affirmed by reasoning that Detective DeVries did not “kn[o]w the ring was exculpatory when he released it.” Decision, at p. 7. That is not the test for bad faith.

Furthermore, the Court of Appeals decision remarkably endorses the State’s argument that the Detective is entitled to assess the merits of the case and dispose of evidence accordingly, as he sees fit. Below, the State argued

that it was proper for Detective DeVries to release the signet ring to Mr. Atkins because the detective was reasonable to have assessed the case as not involving a viable self-defense claim under the law. 1/28/16RP at 75-76 (arguing that the information the detective knew when he released the evidence was that Atkins had not struck Payne, and that the defendant was the aggressor, and therefore that "this ring would serve no purpose" because a primary aggressor "cannot rely upon self-defense as a claim.").

Validating the State's untenable argument, the Court of Appeals relied on the fact that "DeVries . . . determined that [the ring] did not appear to have any evidentiary value." Decision, at p. 4. This stands solely as an endorsement of the State's description of the Detective's thought process, expressed by the deputy prosecutor at the pre-trial Youngblood motion to dismiss. The State *could* have called the detective as a witness at the pre-trial hearing to testify, and perhaps he would have testified that he disposed of the evidence for a *different* reason than the prosecutor's offer of proof that he did so "because a primary aggressor 'cannot rely upon self-defense as a claim,' " but the State did not do so.

Plainly, the detective released the ring because he *had pre-judged the ultimate merits of the case*, and/or because he could not "see" any trace blood or DNA on it despite knowing that such material is not visible to the naked eye. This is the *worst* possible bad faith, contrary to the Respondent's effort

on appeal to turn it on its head and argue that this thought process somehow shows that the detective was operating properly for this reason. See State's Response Brief, at pp. 17-18 (stating that the evidence was of no value because witnesses testified the defendant was the aggressor). The State also remarkably argued below that "[t]here was no evidence that a case detective in the Tukwila department does not have the authority to release items of no apparent relevance." Brief of Respondent, at p. 21.

Similarly untenable is the reliance placed by the Court on the fact that the detective believed the ring had no evidentiary value, which necessarily also accepts the State's argument that the detective did not see blood or DNA on the ring. Decision, at pp. 4, 7. But this nonsensical State's argument that evidence can be disposed of if trace evidence cannot be visually detected on it is contrary to common sense, and, was specifically debunked at trial below where DNA expert Nathan Bruesehoff affirmed that mere cells from the surface of skin contain testable DNA, and these materials are not visible to the naked eye but need to be obtained from the surface of physical evidence by using solvents. 2/11/16RP at 665, 683-84. For his part, Detective DeVries also admitted that any trace DNA of Mr. Payne present on Atkins' ring would not be visible. 2/10/16RP at 562-63.

Importantly, the defendant is not required, in order to preserve his right that the police not destroy evidence, to 'beat the clock' to request that the

police not release evidence that has been collected and taken into the evidence room by the investigating officers. The United States Supreme Court has commented on the irrelevance of a "request" by noting that the police responsibility to preserve all potentially useful evidence, and to not dispose of it in bad faith, cannot depend on whether or not the defense has requested particular evidence. Illinois v. Fisher, 540 U.S. 544, 548, 124 S. Ct. 1200, 1202, 157 L. Ed. 2d 1060 (2004). However, even if the defendant is required to request that the case's evidence not be destroyed, Mr. Payne did so. See CP 264-69 (Notice of Appearance and Request for Discovery, filed by trial counsel on October 22, 2014).

F. CONCLUSION.

Based on the foregoing, this Court should accept review, and reverse Mr. Payne's judgment and dismiss the case with prejudice.

Respectfully submitted this 23rd day of April, 2018.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,	)	No. 75503-0-I
v.	)	DIVISION ONE
JOEL EDWARD PAYNE, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: March 26, 2018

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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MANN, J. — Joel Payne was convicted of assault in the first degree while armed with a deadly weapon and malicious harassment for the stabbing of Randelle Atkins. Payne argues on appeal that (1) he was denied due process after the police returned Atkins's ring before it could be tested for DNA, (2) his right to a public trial was violated when the trial court held a brief sidebar that was not memorialized on the record, (3) his right to counsel was violated when the trial court allowed his court appointed attorney to withdraw before hearing Payne's motion for a new trial, and (4) the trial court erred in calculating his offender score when it considered his out-of-state convictions. We disagree that Payne was denied due process or the right to a public trial. However, because the trial court erred in allowing defense counsel to withdraw from representing

Payne during posttrial proceedings, and because the trial court erred in calculating Payne's offender score, we reverse and remand for new posttrial proceedings.

FACTS

On October 10, 2014, Atkins went shopping at the Southcenter Mall in Tukwila. After Atkins left the mall, he walked toward a convenience store. As he approached the store he passed a man, later identified as Payne, wearing a white mask. After leaving the convenience store, Atkins was approached by Payne who was now wearing the mask on top of his head. Atkins testified that Payne had bruises on his face and "looked kind of messed up." Payne began yelling racial slurs at Atkins and accused Atkins of robbing him. Atkins told Payne that he did not know him and attempted to walk past.

Atkins testified that he felt somebody was close to him and was about to touch him. Atkins raised his hands to create space and Payne stabbed him in the chest. Payne then ran away. Atkins testified that he only felt Payne touch him once. Atkins testified that his hands were full with shopping bags and that he did not swing at Payne. Atkins then sat on a bench and people came to assist him. An ambulance arrived and Atkins was transported to Valley Medical Hospital where they inserted a tube into his lungs to flush blood. Atkins remained in the hospital for two weeks.

Payne testified at trial that Atkins instigated the fight. Payne testified that he was walking alone at Southcenter Mall when he saw a black man wearing dark glasses that he believed had recently robbed him and stolen his notebook computer. Payne testified that the man, Atkins, had followed him out of a store, and when Payne turned around to face him, Atkins struck him twice in the face. Payne testified that he thought Atkins was

going to shoot him and therefore pulled out his pocket knife. Payne testified that Atkins laughed and tried to punch Payne again, and so Payne stabbed him in the chest before running away.

Witnesses to the attack mostly corroborated Atkins's description of events. Melisa Tinsley testified that she saw the fight break out and believed Payne was the aggressor, with Atkins appearing shocked and trying to defend himself. She called 911 after she saw Payne stab Atkins. Another witness, Mandeep Chawla, testified he saw the fight break out, and believed both parties threw a couple of punches, although none to the face.

Peter Mithia, a backroom associate at Sears, found Payne squatting inside a storage bin. Mithia said that Payne had "bruises, a swollen eye, and was bleeding from the mouth." Mithia informed the store's loss prevention officer who called the police. When the police discovered Payne, one of the officers tasered him and he fell to the floor. Payne began reaching into his pants pockets and kicking the officers. One of the officers struck him in the face repeatedly, one kicked him in the arm that was reaching into his pockets, and one sprayed pepper spray in his face. The officers were eventually able to place Payne in handcuffs and remove him from the storeroom.

The officers arrested Payne and searched him, finding two knives in his pockets. One of the knives appeared to have blood on the tip of the blade. Detectives Reed Lancaster and Eric DeVries processed the crime scene. At the scene, the detectives found Atkins's glasses and a ring that Atkins had worn on his pinky finger under a nearby bench. The police photographed the items, packaged them, and placed them into evidence. The day after the assault, Detective Ron Corrigan met with Atkins at the

hospital and took photographs of his hands, which did not reveal any injuries consistent with having punched Payne in the face.

Payne was charged by amended information with one count of assault in the first degree, with a sentencing enhancement alleging Payne was armed with a deadly weapon, and one count of malicious harassment for allegedly stabbing Atkins based on his perception of Atkins's race. At trial, the jury was instructed on self-defense. The jury convicted Payne as charged. Payne appeals.

ANALYSIS

Violation of Due Process

Payne argues first that the police violated his right to due process by returning Atkins's ring before it could be tested for DNA evidence. We disagree.

We review an alleged due process violation de novo. State v. Mullen, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011). Approximately one week after the assault took place, Atkins asked Detective DeVries, the lead detective on the case, if he could have his cellphone, eyeglasses, and ring returned to him. DeVries agreed to return the three items to Atkins because they had already been photographed and he determined that they did not appear to have any evidentiary value. Payne filed a pretrial motion to dismiss, alleging the State committed a due process violation by releasing the ring without Payne having the opportunity to have it tested for the presence of his DNA.[1] Payne argued that testing the ring may have shown Atkins did indeed strike Payne, thus

[1] The defense motion was initially a CrR 8.3(b) motion based on governmental mismanagement. At the hearing, both parties' argument addressed whether there was a due process violation by destruction of evidence, and the court's ruling was based on this argument. The State does not argue that the defense waived this issue.

supporting Payne's theory that he responded in self-defense. The trial court denied the motion.

"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." State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). Due process does not, however, "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, 337, 102 L. Ed. 2d 281 (1988). "Whether destruction of evidence constitutes a due process violation depends on the nature of the evidence and the motivation of law enforcement." State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183 (2011).

We look first to the nature of the evidence. If the State has failed to preserve "material exculpatory evidence," the criminal charges must be dismissed. Wittenbarger, 124 Wn.2d at 475. If the evidence is not "materially exculpatory," but is merely "potentially useful," failure to preserve the evidence only violates due process if the defendant can show the State acted in bad faith. State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001). "Potentially useful" evidence is "'evidentiary material of which no more can be said then that it could have been subjected to tests, the results of which might have exonerated the defendant.'" Groth, 163 Wn. App. at 557 (quoting Youngblood, 488 U.S. at 57). The presence or absence of bad faith turns "'on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" Groth, 163 Wn. App. at 558 (quoting Youngblood, 488 U.S. at 56).

Payne only argues the ring was "potentially useful" evidence. Even if we assume the ring was potentially useful,[2] Payne's due process claim fails because there is no evidence to demonstrate bad faith.

Payne argues DeVries acted in bad faith because (1) he was not following any established procedure to dispose of evidence, (2) the detectives all knew the importance of preserving evidence, and (3) Devries decision to return the evidence was solely based on his own determination that Atkins's cellphone, glasses, and ring were not exculpatory. None of Payne's arguments rise to the level of bad faith.

This court addressed similar arguments in Groth. In Groth, after the murder investigation "went cold," a sergeant ordered destruction of the majority of the physical evidence. Groth, 163 Wn. App. at 554. At trial, someone testified that the evidence would usually have been preserved and that there was enough storage space for the evidence. Groth, 163 Wn. App. at 559. While this court acknowledged that it was "unclear why the evidence was destroyed," we still found there was "no indication that the sheriff's office knew of any exculpatory aspect of the evidence or that its destruction in 1987 was improperly motivated." Groth, 163 Wn. App. at 559. We specifically rejected the argument that "the destruction of evidence that is contrary to policy must demonstrate bad faith," acknowledging that Groth had not even demonstrated any explicit regulation or policy that had been violated. Groth, 163 Wn. App. at 559.

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[2] The State argues that Payne failed to meet the threshold showing that the ring was even "potentially useful." The State relies on State v. Valdez, 158 Wn. App. 626, 629, 241 P.3d 1288 (2010), which held the evidence was not "materially exculpatory" because the evidence "had little or no exculpatory value." Valdez, 158 Wn. App. at 629. However, the court in Valdez did not address whether the evidence was "potentially useful" or whether the State acted in bad faith.. Thus, Valdez is not instructive.

Here, as in Groth, Payne failed to present evidence that DeVries acted in bad faith in returning the ring. There is no evidence that DeVries knew the ring was exculpatory when he released it. Defense counsel had not requested the ring at the time, and DeVries testified that he believed the ring had no evidentiary value. Payne has not demonstrated that DeVries violated any explicit regulation or policy in choosing to return the ring, or actively misled the defense.[3] Because there is no evidence that DeVries acted in bad faith, the return of Atkins's ring did not violate Payne's right to due process.

Public Trial Right

Payne argues next that his right to a public trial was violated when the trial court held a brief sidebar that was not memorialized on the record. We disagree.

Whether a trial court has violated the defendant's public trial right is a question of law we review de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The right to a public trial is guaranteed by article I, sections 10 and 22 of the Washington State Constitution. State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015), cert. denied, 136 S. Ct. 1524 (2016). However "[t]he right to public trial is not absolute." State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). "[W]hile openness is a hallmark of our judicial process, there are other rights and considerations that must sometimes be served by limiting public access to a trial." Wise, 176 Wn.2d at 9. To balance the public trial right and other competing rights and interests, the court applies a three-step analysis: (1) whether the public trial right attaches to the proceeding at

[3] See United States v. Cooper, 983 F.2d 928, 930-31 (9th Cir. 1993).

issue, (2) whether the courtroom was closed, and (3) whether the closure was justified. Love, 183 Wn.2d at 605; Wise, 176 Wn.2d at 9. "The appellant carries the burden on the first two steps; the proponent of the closure carries the third." Love, 183 Wn.2d at 605.

Washington courts have adopted the experience and logic test to determine whether the proceeding at issue implicates the public trial right. State v. Smith, 181 Wn.2d 508, 514, 334 P.3d 1049 (2014). "[T]he experience prong, asks 'whether the place and process have historically been open to the press and general public.'" State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012) (quoting Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Sublett, 176 Wn.2d at 73 (quoting Press, 478 U.S. at 8). If the public trial right attaches, the court must apply the weighing test described in State v. Bone-Club, 128 Wn.2d 254, 258, 906 P.2d 325 (1995), before the proceeding may be closed to the public. Sublett, 176 Wn.2d at 73.

The issue in this case is whether the public trial right attached to the sidebar conference and whether the sidebar constituted a closure of the courtroom. The sidebar occurred during the State's direct examination of Detective Corrigan. The State asked Corrigan,

> [STATE]: Detective, you additional (sic) said that on your second visit to the hospital to see Mr. Atkins, you also took some photographs of his hands. Why did you do that?
> [CORRIGAN]: I talked to Detective DeVries or another detective and they told me that there was—
> [DEFENSE]: Your Honor, could see (sic) have a discussion outside the presence of the jury before he answers this line of inquiry?

[COURT]:	Is that something you and counsel can confer about briefly when you do that? Just talk for a second.
	PAUSE
[STATE]:	I don't believe we can.
	SIDEBAR CONFERENCE
[STATE]:	Detective Corrigan, let me ask a specific question. In this regard, why did you feel it was important to take pictures of Mr. Atkins' hands?
[CORRIGAN]:	Because I received information that there may have been a fight or a struggle at the scene and I wanted to check his hands to see if there was any injuries and to document his hands and so I took photographs of his hands.
[STATE]:	So that being said, I'm going to show you some photos.
[CORRIGAN]:	Okay.
[STATE]:	Are these the photos that you took?
[CLERK]:	State's Exhibits 61 through 64 are marked.

In Smith, our Supreme Court held that sidebar conferences are not proceedings implicating the public trial right as they failed both the experience and the logic prong of the proceeding test. 181 Wn.2d at 516-20. The court reasoned, "[s]idebars have traditionally been held outside the hearing of both the jury and the public. Because allowing the public to 'intrude upon the huddle' would add nothing positive to sidebars in our courts, we hold that a sidebar conference, even if held outside the courtroom, does not implicate Washington's public trial right." Smith, 181 Wn.2d at 519. The court's holding was limited to "proper sidebars," dealing with "mundane issues implicating little public interest." Smith, 181 Wn.2d at 516-19 (citing Wise, 176 Wn.2d at 5). "Evidentiary rulings that are the subject of traditional sidebars do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness." Smith, 181 Wn.2d at 518.

In a footnote, however, the Supreme Court also stated the determination of "[w]hether the event in question is actually a sidebar is part of the experience prong

inquiry and is not subject to the old legal-factual test." Smith, 181 Wn.2d at 516, n.10. In order to "avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record." Smith, 181 Wn.2d at 516, n.10. While this clarification was limited to a footnote, it was later affirmed in State v. Whitlock, 188 Wn.2d 511, 520, 396 P.3d 310 (2017).

Payne argues that because the trial court never memorialized the sidebar on the record it was improper and his public trial right was violated. We agree that under Smith, the court is to memorialize sidebars on the record to best avoid implicating the right to a public trial. However, the appellant still carries the burden of proving that the sidebar in the case is one that implicated the public trial right. And, in this case, the trial court's failure to memorialize the sidebar discussion, by itself, does not carry Payne's burden of proving the sidebar was improper and violated his right to a public trial.

Division Three of this court considered a similar issue in State v. Crowder, 196 Wn. App. 861, 867, 385 P.3d 275 (2016), review denied, 188 Wn.2d 1003, 393 P.3d 361 (2017). In Crowder, the trial court engaged counsel in an unrecorded sidebar during a juror challenge before entering its formal ruling. The appellant argued that this unrecorded sidebar violated his public trial right. There, as is here, the substance of the sidebar was never recorded. Nonetheless, the court held, "Crowder's public trial argument would have traction only if he could show something substantive occurred during the off-the-record sidebar." Crowder, 196 Wn. App. at 867 (emphasis added). The State argued "the sidebar discussion simply addressed non-substantive procedural matters regarding the trial court's motions practice" and "Crowder [did] not contest this

proffer and nothing in the record suggests it is inaccurate." Crowder, 196 Wn. App. at 867. The court explained that it is the appellant's burden to establish "the sidebar in his case falls outside the general rule," and that Crowder failed to meet this burden.

We likewise hold Payne failed to meet his burden of demonstrating the sidebar in his case "falls outside the general rule." The State argues the sidebar in this case appears to be related to evidentiary issues. The record supports this claim and Payne provides no evidence to the contrary.

Here, the sidebar arose as Detective Corrigan stated "I talked to Detective DeVries or another detective and they told me that there was . . ." Defense counsel then requested to "have a discussion outside the presence of the jury before he answers this line of inquiry." Based on the context, Payne was likely concerned that this line of testimony was going to incorporate hearsay statements[4] made by the other detectives, and wanted to ensure those statements would not be admitted. After the sidebar, the State rephrased the question in a manner that avoided any hearsay statements of nontestifying persons. Because Payne provides no evidence supporting his assertion that the sidebar considered topics outside those included in a "proper sidebar" dealing with "mundane issues," we hold that Payne has failed to meet his burden. Smith, 181 Wn.2d at 516-19.

Furthermore, it is notable that it was defense counsel who requested the discussion outside the presence of the jury, requiring the sidebar. But defense counsel never requested to have the discussion memorialized on the record or made any other

[4] "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801.

statement about the sidebar discussion. Defense counsel had every reason to know whether the sidebar had expanded beyond traditional sidebar topics and could implicate the public trial right. It is well established that under the invited error doctrine a party is precluded from setting up an error at trial and then complaining of it on appeal, even when that error is of constitutional magnitude. State v. McLoyd, 87 Wn. App. 66, 69, 939 P.2d 1255 (1997), aff'd sub nom. State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999).

Right to Counsel

Payne argues next that he received ineffective assistance of counsel during posttrial motions and sentencing. This is so, Payne contends, because he was denied substitute counsel after his defense counsel was permitted to withdraw from representation after filing an Anders motion.[5] We agree.

A. Additional Procedural Facts

After the verdict, and before the sentencing hearing, the trial court appointed new defense counsel to represent Payne. After defense counsel was appointed, he informed the court that Payne had expressed the desire to file a CrR 7.5 motion for a new trial, noting that he may need to file an Anders brief if he believed it was frivolous. Soon thereafter defense counsel filed a "Motion to Withdraw Pursuant to Anders v. California" in which he also cited RAP 15.2(i).[6] Counsel's stated grounds were that "RAP 15.2(i) provides for the withdrawal of counsel on appeal where the attorney can find no basis for a good faith argument on review. In accordance with the due process

[5] Anders v. State of Cal., 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).
[6] Defense counsel citied RAP 15.2(h) but clearly meant RAP 15.2(i).

requirements of Anders v. California, supra, McCoy v. Wisconsin, 486 U.S. 429, [108 S. Ct. 1895, 100 L. Ed. 2d 440] (1988), and State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970)."

The trial court held the scheduled hearing for the motion for a new trial and addressed counsel's motion. At the hearing, the court informed Payne of the motion and asked if he wanted to "proceed with that motion on [his] own?" After being informed that he would not be given new counsel for the motion, Payne eventually agreed to proceeding with the motion pro se, as long as he was given more time to prepare the motion. Payne also stated he did not mind having defense counsel return as his attorney for sentencing.

The court granted defense counsel's motion to withdraw for the purposes of the motion for a new trial, but stated he would return to represent Payne for sentencing.

At the motion for a new trial, the trial court noted that defense counsel was not present, even as standby counsel. The trial court stated, "I'm a little concerned, very concerned that [defense counsel] isn't here because of a couple of things. He, of course, cited the appellate rule, as opposed to the motion for reconsideration or a motion for new trial at this trial level. Be that as it may, Mr. Payne, as I said, I have read your material and it seems like you know what your responsibilities are." The trial court agreed to hear the motion, informing Payne that he could talk to defense counsel "about whether or not you want to ask for reconsideration." The trial court then denied Payne's motion. Defense counsel returned the next day to represent Payne at the sentencing hearing. Payne does not cite error to the trial court's decision on the motion.

B. Right to Counsel

"The right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding." State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); CR 3.1(b)(2). The motion for a new trial is a posttrial, pre-appeal proceeding, in which the court may grant a new trial based on certain circumstances "when it affirmatively appears that a substantial right of the defendant was materially affected." CrR 7.5(a). While there is no Washington case on point, the federal circuit courts that have addressed whether the time period for making a motion for new trial is a critical stage have concluded that it is. See McAfee v. Thaler, 630 F.3d 383, 391 (5th Cir. 2011); United States v. Williamson, 706 F.3d 405, 416 (4th Cir. 2013).[7] The State concedes that this time period is likely a critical stage in the trial. In accordance with the overwhelming authority, we hold a posttrial motion is a critical stage of the criminal proceeding.

The next issue is whether defense counsel could properly withdraw under Anders. Anders established the constitutional minimums that must be met before appellate counsel may decline to pursue an appeal on the grounds that it is frivolous. 386 U.S. at 744. Washington has codified this rule though RAP 18.3, which allows appellate counsel appointed in a criminal case to file a request to withdraw, known as an Anders brief, if they can find no basis for a good faith appeal. RAP 18.3(a)(2). "In

[7] The Ninth Circuit also held "every federal circuit that has addressed whether a post-trial, pre-appeal motion for a new trial constitutes a 'critical stage' has concluded that it does." Rodgers v. Marshall, 678 F.3d 1149, 1158 (9th Cir. 2012). That decision was reversed by the United States Supreme Court in Marshall v. Rodgers, 569 U.S. 58, 61, 133 S. Ct. 1446, 185 L. Ed. 2d 540 (2013), although the court declined to address the issue of whether "a post-trial, preappeal motion for a new trial is a critical stage of the prosecution," simply stating "For purposes of analysis here, it will be assumed, without so holding, that it is."

such a situation the court may relieve counsel and either dismiss the appeal or leave the indigent to proceed pro se; however, the [appellate] court must first ascertain that the appeal is in fact frivolous lest it deny the defendant his constitutional right to appeal." State v. Hairston, 133 Wn.2d 534, 536-37, 946 P.2d 397(1997). It is undisputed that Anders only considers the withdrawal of appellate counsel. Anders, 386 U.S. at 744.

Division Three of this court considered a similar case where trial counsel filed an Anders brief seeking to withdraw as counsel because he could not "find any assignment of error that would support a meritorious challenge to the entry of the guilty plea." State v. Chavez, 162 Wn. App. 431, 436, 257 P.3d 1114 (2011). The Chavez court rejected the use of an Anders brief at the trial court, holding there is "no precedent or other authority" that permits the use of an Anders brief to withdraw from representation at the trial court. Chavez, 162 Wn. App. at 440. We agree with Chavez that there is no case or authority that permits trial counsel to withdraw using an Anders brief. Accordingly, allowing defense counsel to withdraw in this case was error.

The State concedes trial counsel erred in filing an Anders brief, but argues Payne waived his right to counsel. We disagree. A trial court must establish that a defendant, in choosing to proceed pro se, makes a knowing and intelligent waiver of the right to counsel. State v. Bebb, 108 Wn.2d 515, 525, 740 P.2d 829 (1987). The defendant's request must be stated unequivocally. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). In this case, Payne unmistakably did not request to proceed without counsel. Although Payne stated he was willing to proceed pro se, he only did so because he was told that his counsel was withdrawing from representation and that he would not be appointed new counsel for the motion.

While appointed defense counsel is not necessarily required to file all motions requested by his client, counsel may not wholly withdraw from representation during a critical stage of trial.[8] "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984); see also State v. Silva, 108 Wn. App. 536, 542, 31 P.3d 729 (2001). We hold Payne was denied his Sixth Amendment right to counsel during the motion for a new trial and remand for new posttrial proceedings with appointed counsel present.

Payne also argues that he was denied his right to the effective assistance of counsel at sentencing because his defense counsel had a conflict of interest that precluded all further representation. Because we must remand for resentencing on other grounds, we do not address this issue.

Offender Score

Payne argues the trial court erred in calculating his offender score. Sentencing courts calculate a defendant's offender score based on prior convictions. RCW 9.94A.525(3). Prior out-of-state and federal convictions are classified "according to the comparable offense definitions and sentences provided by Washington law." RCW

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[8] "'General agreement exists that the decisions as to guilty plea, jury trial, appeal, defendant's presence at trial, and the defendant testifying are for the defendant, and that decisions on a substantially larger group of matters, such as objecting to inadmissible evidence, are for counsel.'" In re Pers. Restraint of Stenson, 142 Wn.2d 710, 735, 16 P.3d 1 (2001)(quoting 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 11.6(a) at 603 (2d ed.1999)). "'The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.'" Stenson, 142 Wn.2d at 736; (citing 1 ABA, STANDARDS FOR CRIMINAL JUSTICE std. 4-5.2(b) (2d ed. Supp. 1986)); State v. Grier, 171 Wn.2d 17, 31, 246 P.3d 1260 (2011).

9.94A.525(3); State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). The State bears the burden of proving, by a preponderance of the evidence, the existence, and comparability, of a defendant's prior out-of-state conviction. Ross, 152 Wn.2d at 230. We review the sentencing court's calculation of the offender score de novo. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). "[T]he remedy for a miscalculated offender score is resentencing using a correct offender score." State v. Wilson, 170 Wn.2d 682, 691, 244 P.3d 950 (2010) (quoting Ross, 152 Wn.2d at 228).

The State concedes to both of Payne's claimed errors. First, the State concedes that a federal bank robbery is not comparable to a violent offense in Washington, as such, the trial court improperly counted Payne's past federal bank robbery charge as two points. Second, the State concedes the Oregon conviction for unauthorized use of a motor vehicle is not legally or factually comparable to Washington's offense of taking a motor vehicle without the owner's permission in the second degree. Accordingly, we reverse and remand for resentencing.

Although the State acknowledges that remand is required, the State asks this court to determine whether the conviction for "unauthorized use of a motor vehicle" is comparable to Washington's felony possession of stolen property. We hold this issue is properly reserved for the trial court on remand.

While a challenge to the sentencing court's existing classification of an out-of-state conviction is reviewed de novo, the proper forum for a new classification of out-of-state convictions is at the sentencing hearing. State v. Beals, 100 Wn. App. 189, 196-97, 997 P.2d 941 (2000). The sentencing hearing is the forum in which "the State can present necessary documentary evidence, the defendant can refute the State's

evidence and arguments, and the court can then engage in the required comparison on the record to determine if the State met its burden of proof." Beals, 100 Wn. App. at 196-97. At resentencing, the State may also offer its argument that the federal conviction may be counted as a generic federal offense and scored as one point, pursuant to RCW 9.94A.525(3) and RCW 9.94A.530(2).

Statement of Additional Grounds

Payne submitted a statement of additional grounds in which he raises challenges to witness credibility, the jury instructions, the State's disclosure of evidence, and the effectiveness of his counsel.

A. Credibility Determinations

First, Payne broadly argues he was denied his right to a fair trial by attacking the credibility of Atkins and various other witnesses. While Payne may dispute Atkins' credibility or version of the facts, matters pertaining to the credibility of witnesses, conflicting testimony, and the persuasiveness of the evidence are the exclusive province of the trier of fact. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007).

B. Jury Instructions

Payne next challenges several of the jury instructions. First, Payne contends that the assault instructions were confusing because "read alone" they did not state the stabbing can be legal if done in self-defense. However, the jury was provided a separate instruction on self-defense. To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.

State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Payne does not challenge the self-defense instruction, thus the instructions, read as a whole, informed the jury that self-defense was an available defense in this case.

Payne argues next that he should have received a lesser included offense instruction, although he did not request the lesser included instruction. Under RAP 2.5(a), a claim on appeal is waived if the party failed to make the argument at trial, unless the claim is of a manifest constitutional error. RAP 2.5(a). The failure to instruct on a lesser included offense does not constitute manifest constitutional error. See State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5(a). Payne has waived this claim.

C. Prosecutorial Misconduct

Payne argues the prosecutor committed misconduct by withholding evidence. "[W]ithholding of evidence violates due process if the evidence is favorable to a defendant and material to his case." State v. Boyd, 29 Wn. App. 584, 587, 629 P.2d 930 (1981). Payne contends the prosecutor withheld video evidence and did not timely provide evidence of the expert's testimony, however, there is nothing on the record to support either contention. Instead, Payne's argument relies entirely on "facts or evidence not in the record," in fact, Payne admits he has no evidence that the video even exists. Such arguments are properly raised through a personal restraint petition, not a statement of additional grounds, and we do not address them. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

D. Ineffective Assistance of Trial Counsel

Lastly, Payne briefly argues he received ineffective assistance of counsel, generally challenging trial counsel's effectiveness during direct and cross-examination and her ability to retrieve the necessary evidence. The burden is on a defendant alleging ineffective assistance of counsel to show defense counsel's objectively deficient performance prejudiced him, based on the record established in the proceedings below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We strongly presume counsel was effective. McFarland, 127 Wn.2d at 336. Decisions to call witnesses or ask certain questions are generally tactical or concern matters outside the record and will not support an ineffective assistance claim. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262 (1983).

Here, Payne has failed to point to any specific act by defense counsel that he believed was deficient. Although a defendant is not required to cite to the record or authority in his SAG, "he must still 'inform the court of the nature and occurrence of [the] alleged errors' and this court is not required to search the record to find support for the defendant's claims." State v. Meneses, 149 Wn. App. 707, 716, 205 P.3d 916 (2009), as amended (Apr. 13, 2009), aff'd in part, 169 Wn.2d 586, 238 P.3d 495 (2010). The other claims, that defense counsel failed to acquire the unsubstantiated video evidence, again relies on evidence outside of the record and thus cannot be considered on a direct appeal.

We reverse and remand for posttrial proceedings.

Mann, J.

WE CONCUR:

Trickey, ACJ

Leach, J.

APPENDIX B

FILED
4/20/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,	)	No. 75503-0-I
Respondent,	)	
v.	)	DIVISION ONE
JOEL EDWARD PAYNE,	)	ORDER DENYING MOTION FOR RECONSIDERATION
Appellant.	)	

Appellant Joel Payne has filed a motion for reconsideration of the court's opinion filed on March 26, 2018. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE PANEL:

Mann, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75503-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
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Date: May 8, 2018

WASHINGTON APPELLATE PROJECT

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