SUPREME COURT NO. 96204-9

NO. 76837-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES MARCELLUS TAYLOR,

Petitioner.

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

The Honorable David Keenan, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Charles Taylor, the appellant below, seeks review of the appended Court of Appeals decision in State v. Taylor, noted at ___ Wn. App. 2d ___, 2018 WL 3540027, No. 76837-9-I (Jul. 23, 2018).

B. ISSUES PRESENTED FOR REVIEW

1. A canine track led officers to Taylor. The results of the track were presented at trial without sufficient corroborating facts establishing Taylor as the suspect. Does the state's failure to put forth sufficient evidence corroborating the canine track require that Taylor's conviction be reversed under State v. Loucks, 98 Wn.2d 563, 656 P.2d 480 (1983)?

2. WAC 139-05-915(7)(a) sets out "requirements of training for law enforcement and corrections dog handlers and certification of canine teams" and requires each agency "to keep training, performance, and identification records on canines." At trial, Officer Frank testified that he and the canine officer, Ace, had done thousands of training tracks and that Ace was "85-90 percent" accurate in training tracks. No training records or information about the unsuccessful tracks were disclosed to defense. Were the canine's training, performance, and identification records material and exculpatory, such that the state's failure to preserve or disclose such records violated due process?

C. STATEMENT OF THE CASE

The state charged Taylor with one count of attempting to elude a pursuing police vehicle. CP 1-6. It later added a special allegation of endangerment. CP 8-9.

Lack of Corroborating Evidence

Officer Gruener testified that on June 17, 2016, he was on duty driving eastbound on Route 518 and observed a Honda. RP 251-52. He ran the Honda's license plate number and it showed as sold more than forty-five days earlier with title not yet transferred. RP 254, 257. Officer Gruener turned on his patrol vehicle lights to initiate a stop. RP 263. The vehicle accelerated and exited the highway at a high rate of speed, and Officer Gruener terminated the pursuit. RP 263, 272, 274. He testified that he could see the taillights of the vehicle and he could see that it pulled off somewhere to the left. RP 276.

Officer Gruener found the Honda in a parking lot. RP 277. While he did not see anyone in the vehicle, standing next to the vehicle, or exiting the vehicle, he saw someone running away. RP 277, 299, 301-02. He described that person to dispatch as a white male with a white shirt or t-shirt. RP 277.

A Tukwila police officer, Officer Frank, arrived around ten minutes after Officer Gruener ended his pursuit of the Honda. RP 279. Officer Gruener again described the person driving the Honda to Officer Frank as a

white male wearing a white t-shirt. RP 308-09. Officer Frank and his canine, Ace, began a track. RP 280. Other people who were working nearby came outside when Officer Frank made a canine announcement. RP 421. Officers also encountered an individual sleeping in an outdoor shed in the course of the track. RP 450-51. They located Taylor about 400 yards from Officer Gruener. RP 280. Taylor is a black male and was wearing a green "skin tight" shirt and dark pants. RP 284; 445. After Taylor was found, Officer Gruener looked inside the Honda and did not find any items related to Tylor. RP 355.

The next day, Officer Gruener wrote his report. RP 305. Adding to his description of the suspect after encountering Taylor, he reported that the person he saw running from him was a white or light-skinned male, with a medium build, wearing dark pants, and wearing a white/light-colored "skin tight" t-shirt. [1] RP 305-06.

Officer Gruener contacted the registered owner of the vehicle, McKim, the next day. RP 283. He did not investigate the vehicle itself

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[1] The court also held a CrR 3.5 hearing to determine the admissibility of Taylor's statements to Officer Gruener. RP 3-36. After reading Taylor warnings pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), at the scene, Officer Gruener followed Taylor to the hospital where he was being treated for dog bite injuries to his head and neck. RP 19, 21. Officer Gruener "asked [Taylor] why he didn't pull over and why he ran." RP 21. Taylor replied, "I was sleeping." RP 21. The trial court concluded the statement was admissible. Unsurprisingly, however, the state did not attempt to elicit this exculpatory statement through Officer Gruener at trial.

further, for example by testing it for fingerprints, because he was confident that the subject that was in custody was the driver of the Honda who had fled from him. RP 284.

McKim testified that her ex-boyfriend, Craig Kendall, gave her the Honda in question as a gift and she had refused to accept it. RP 370. Kendall kept the car and drove it around. RP 371. In June 2016 an officer contacted McKim and asked her if it was stolen. RP 373. She was told she was the registered owner. RP 376.

The prosecutor asked McKim if she had ever met anyone in the courtroom previously, to which McKim replied: "this is kind of weird, but I – okay, so clearly this person here is who we're talking about. I, in my head, was thinking a completely different person." RP 376. When asked if she met Taylor before, she replied: "I have – kind of. Not – I don't – I don't know. . . I was picturing someone completely different." RP 376-77. McKim testified that Taylor looked familiar. RP 377. The prosecutor asked McKim, "At one time did the name Charles Taylor sound familiar to you?" RP 378. She answered, "Yes, but it was somebody different." RP 378. Then the following exchange occurred:

> STATE: And the person who is sitting at defense counsel table, can you -- actually the person we're talking about, can you identify that person just with an article of clothing and where they're sitting in the courtroom?

McKIM: That you're talking about right now?

STATE: Yea. Uh-huh.

McKIM: I'm guessing next to the two lawyers in the – in the plaid shirt and khakis.

STATE: Okay. So let the record reflect the witness has identified the defendant.

RP 379.

Officer Frank testified in detail about his training and experience, and the canine track in this case. RP 382-92, 408-37, 450-65. He also testified that he saw the driver's seat of the Honda in question, and that it would take a full-grown adult to pilot the vehicle with the seat in the position that it was. RP 465. He said the position of the seat was consistent with the height and build of the defendant, but provided no further details. RP 465.

The State's Failure to Preserve

Defense submitted a trial brief on March 27, 2017, in which it moved for production of "Brady material" under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). CP 30-31.

Defense also submitted a motion to exclude testimony relating to canine tracking on March 27, 2017. CP 10-18. One basis for defense's motion to exclude the canine's track was that the state failed to disclose any "erroneous tracking or other identification processes that Officer Frank and canine Ace have ever had in their multi-year partnership." CP 13. In fact, the

state never disclosed any records whatsoever relating to Officer Frank and canine Ace. CP 13. Defense cited Aguilar v. Woodford, in which the Ninth Circuit held that a canine's history of making erroneous scent identifications is exculpatory evidence. 725 F.3d 970, 982 (9th Cir. 2013). Defense also cited the Washington Administrative Code (WAC) 139-05-915. CP 12. This WAC provision sets out "requirements of training for law enforcement and corrections dog handlers and certification of canine teams" and *requires* each agency "to keep training, performance, and identification records on canines." WAC 139-05-915(7)(a); CP 17. The records must stay with the agency responsible for the canine team. WAC 139-05-915(7)(a); CP 17. "The records will include, but not be limited to . . . [training] records . . . [and] [c]opies of all incident reports in which use of the canine resulted in the use of force." WAC 139-05-915(7)(a)(iv), (xi); CP 18. The WAC requires the records to be retained at least one year from the date the canine is removed from active service. WAC 139-05-915(7)(b); CP 18.

During the defense interview of Officer Frank, the officer had presented himself and Ace, the canine officer, as an infallible team. RP 50. Officer Frank cited to two instances in which Ace did not complete a track due to third parties, but details were not provided. RP 50.

At trial, Officer Frank testified that he and Ace had done thousands of training tracks. RP 390. When asked what percentage accuracy Ace had

demonstrated in training situations, Officer Frank answered a "[v]ery high percentage." RP 412. When pressed for a number, Officer Frank testified: "I would say above – for training tracks, it's above 85-90 percent." RP 413. Officer Frank also testified that in an official capacity, he and Ace had done hundreds of tracks. RP 390. He testified that based on those tracks, he had made 60 arrests. RP 415. No training records or information about unsuccessful tracks were disclosed to defense.

In response to defense's motion to exclude canine evidence under Brady, the trial court cited Loucks, which concerns foundational requirements of presenting canine track evidence at trial, not Brady material. 98 Wn.2d at 563; RP 46. The court noted that defense could simply ask the officer during cross-examination whether the dog had ever made a mistake. RP 47. Defense pointed out that Brady issues are separate from foundational requirements. RP 48. The court then asked whether prior erroneous tracks went to the general reliability of the dog and to weight the jury should give the track, not its admissibility. RP 49. Defense again pointed out that the state has an affirmative duty to provide information related to erroneous tracks under Brady, noting that the duty to disclose is absolute and must be considered before any foundational issues at trial or whether the issue is ripe for cross-examination. RP 49.

The court then ordered the state to disclose any Brady material as to the canine. RP 54. After speaking with the officer, the state represented to the court: "I described what it was that the Court and the defense was asking for in terms of a track that Ace conducted and completed and identified a suspect where later on it was determined that that was the wrong person. And Officer Frank indicated, no, that has not happened." RP 178. Defense pointed out that Officer Frank had mentioned two instances when people "inserted themselves in the middle of the track, and then we contacted them as a result of that." RP 179. Officer Frank did not disclose any training records regarding erroneous tracks. The court found that the state had satisfied its duty. RP 179.

The primary issue at trial was the identity of the driver of the vehicle in question. RP 539, 555.

The jury convicted Taylor of attempting to elude a pursuing police vehicle. CP 58. The jury was unable to reach a decision as to the enhancement and was discharged. RP 604-05. Taylor was sentenced to 22 months in custody. CP 97; RP 621.

Taylor appealed. CP 113-123. He argued that Ace's track was insufficient to sustain his conviction because it was unsupported by other evidence linking Taylor to the crime. Br. of Appellant at 8-12; Reply Br. of Appellant at 1-2. Taylor also argued that the state's failure to disclose or

preserve training and performance records on Ace concerning Ace's error rate, which were material and favorable to Taylor, violated Brady v. Maryland. Br. of Appellant at 12-16; Reply Br. of Appellant at 2-8.

While acknowledging "dangers inherent in the use of dog tracking evidence," Loucks, 98 Wn.2d at 567, the Court of Appeals held that the evidence presented by the state at trial was sufficient to sustain the conviction. Appendix at 4. This corroborating evidence consisted in part of McKim's testimony that her boyfriend, who drove the car in question, had a friend named Charles Taylor who she remembered as "a completely different person" than the defendant. Appendix at 4. The court also noted that Taylor was located 400 yards from the vehicle in an "empty business park." Appendix at 4. Finally, the court relied on its finding that Taylor matched the officer's description of the suspect. Appendix at 4.

The Court of Appeals also found that former WAC 139-05-915(7), requiring that canine training records be maintained by law enforcement agencies, does not specifically require records of success or failure in tracking. Therefore, the court reasoned, "Taylor fails to establish that the state was obligated to create and possess records that reflect the success or error rate of the canine." Appendix at 7. Distinguishing this case from Aguilar, 725 F.3d at 982, where the evidence showed a documented history that the canine had identified the wrong suspect, "here there is no indication

that the documentation sought ever existed." Appendix at 7. Because there was no indication that the records ever existed or that the state was required to have or maintain them, the Court of Appeals held that Taylor failed to show a Brady violation. Appendix at 8. The court simply did not address whether evidence of Ace's missed tracks would have been exculpatory, limiting its analysis to whether the state was required to maintain such records. Appendix at 8.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS DECISION CONFLICTS WITH THE SUFFICIENCY PRINCIPLES AT ISSUE IN *STATE V. LOUCKS*

The evidence the Court of Appeals considered corroborative of Ace's track either contradicts Ace's track or fails to strengthen or confirm the track. Ace's identification of Taylor as the driver of the Honda is insufficient on its own to sustain a conviction, and the court's reliance on evidence that did not tend to strengthen or confirm Ace's track conflicts with the facts and principles set out in State v. Loucks, necessitating RAP 13.4(b)(1) review. Further, because the Court of Appeals treated Officer Gruener's description of the suspect in his report as corroborative of the track—a description that was altered to fit Taylor's appearance after Officer Gruener saw Taylor in custody—review is appropriate under RAP 13.4(b)(4). Whether an officer's description of a suspect that is altered after

the officer sees a suspect in custody can constitute corroborating evidence of a canine track is a matter of substantial public interest.

In Loucks, the defendant was charged with second degree burglary after a break-in occurred and a canine track led officers to the defendant, who was nearby. Id. at 564. When the burglary was reported, a canine unit arrived, and the dog led officers to Loucks who was lying at the bottom of a nearby stairwell. Id. at 565. The dog bit Loucks. Id. Fingerprints and blood found at the scene did not match Loucks, but the state argued that Loucks was working with an accomplice. Id. at 565-66, 567. The court found that Loucks's presence in the area did not corroborate the canine track because it was susceptible to too many constructions to constitute evidence that Loucks was involved with the crime. Id. at 568. Finding the dog's identification of Loucks to be uncorroborated, the court held that the evidence presented was insufficient to sustain his second degree burglary conviction. Id. at 569.

Though the Court of Appeals found that McKim's testimony linked Taylor to the Honda, Appendix at 4, McKim repeatedly stated she was unsure if she met or had seen Taylor before, and that the Charles Taylor she did know was a completely different person than the defendant. RP 376-77. The description of the individual running away from Officer Gruener tends to exculpate Taylor. Taylor is not a white male and was not wearing a white t-shirt, and details in Officer Gruener's report regarding that individual's

description which were added only *after* he saw Taylor do not constitute corroboration of Ace's track. Taylor was not the registered owner of the vehicle and nothing in the vehicle established a link to Taylor. RP 355, 376. Finally, as in Loucks, Taylor's presence in the area is susceptible to too many constructions to constitute corroboration. Loucks, 98 Wn.2d at 568. The Court of Appeals erroneously noted that Taylor was found in an "empty business park," Appendix at 4, though there were employees associated with a nearby business present as well as another person officers encountered on the track who was sleeping in a shed. RP 450-51.

As nothing in the record corroborates Ace's track to associate Taylor with the Honda in question, the Court of Appeals decision conflicts with the sufficiency principles espoused in Loucks and merits review under RAP 13.4(b)(1). Whether an officer's physical description of a suspect that has been altered to fit the description of a suspect in custody can constitute corroborating evidence of a canine track is a matter of substantial public interest and review is also warranted under RAP 13.4(b)(4).

2. WHETHER ACE'S TRAINING AND PERFORMANCE RECORDS ARE MATERIAL AND EXCULPATORY SUCH THAT THE STATE'S FAILURE TO PRESERVE OR DISCLOSE THESE RECORDS VIOLATES DUE PROCESS IS A SIGNIFICANT CONSTITUTIONAL QUESTION

Washington recognizes a constitutional duty of the state to preserve evidence. State v. Wright, 87 Wn.2d 783, 557 P.2d 1 (1976). This duty derives from the duty to disclose exculpatory evidence, as due process protections afforded to the accused require the state to disclose evidence when it is material to the issue of guilt or innocence. See Brady, 373 U.S. at 86. Any failure to preserve evidence that is material and favorable to a defendant generally violates that defendant's constitutional right to due process and a fair trial. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). The duty to preserve evidence applies not only to the prosecution, but also to law enforcement officials. State v. Judge, 100 Wn.2d 706, 717, 675 P.2d 219 (1984). If the evidence meets the standard of materially exculpatory, criminal charges against a defendant must be dismissed if the state fails to preserve it. State v. Witternbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994); State v. Burden, 104 Wn. App. 507, 511-12, 17 P.3d 1211 (2001).

Evidence is materially exculpatory 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. Materiality requires a defendant show that there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In re Pers. Restraint of Stenson, 174 Wn.2d 474, 487, 276 P.3d 286 (2012). A "reasonable probability" is shown when the government's suppression of evidence undermines confidence in the outcome of trial. Id.

This test makes the good or bad faith of the state irrelevant when the government fails to preserve and provide the defendant with materially exculpatory evidence. Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). The Washington Supreme Court has adopted the Youngblood standard to assess the state's obligations to preserve exculpatory evidence in Washington. Wittenbarger, 124 Wn.2d at 481.

Here, not only was law enforcement required to preserve and disclose Ace's training and identification records under Brady, but preservation was required pursuant to WAC 139-05-915(7)(a).[2] CP 17. A

[2] The Court of Appeals disputes that former WAC 139-05-915(7)(a)(iv) obligated the state to create and possess records that reflect the success or error rate of a canine while training. Appendix at 7. Former WAC 139-05-915(7)(a) requires "[e]ach agency to keep training . . . records on canines." "Training" is defined as "any structured classroom or practical learning exercise conducted, evaluated, and documented by an experienced dog handler or trainer . . ." WAC 139-05-915(2)(c). Apart from the fact that the state was obligated to preserve records of

canine's history of making erroneous scent identifications is exculpatory evidence. Aguilar v. Woodford, 725 F.3d 970, 982 (9th Cir. 2013).[3] Officer Frank testified he and Ace had done thousands of training tracks and that he would estimate Ace's accuracy in tracking was "above 85-90%." RP 413. First, rather than look to records that Officer Frank was required to maintain to determine Ace's actual accuracy rate, the state's failure to preserve such records required the parties and the factfinder to take Officer Frank's estimate as true and insulated him from effective cross-examination as to that accuracy rate. Second, even taking Officer Franks's estimate of Ace's accuracy as truth, defense was left without records pertaining to the up to 14 percent of Ace's erroneous tracks.

Though the Court of Appeals simply never addressed Taylor's argument that these records were material and exculpatory, their exculpatory value is apparent on its face. Defense was unable to obtain comparable

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Ace's error rate and erroneous tracks because this information was materially exculpatory, the Court of Appeals' interpretation of the code is inconsistent with its plain language which requires that records made while evaluating a canine during training be maintained.

[3] The Court of Appeals distinguishes Aguilar from the case at hand because the canine in that case had misidentified suspects in the field, not while training, and because documentation establishing those past misidentifications existed. Appendix at 7. The court provides no basis for distinguishing between an inaccurate track in the field and an inaccurate track while training for Brady purposes. And that there does not appear to be documentation of Ace's error rate in training, which could only be estimated by Officer Frank, is problematic under Brady.

evidence by other means because the only lawful custodian of those records, Officer Frank, could only estimate regarding the information sought. While the state represented to the trial court that there were no instances where Ace identified a *suspect* who was later determined to be the wrong person, RP 178, it did not address records of Ace's erroneous training tracks in which suspects would not be involved. The state did not disclose any training and performance records of a canine known to have an error rate, despite defense counsel's request for exculpatory information or material in its initial notice of appearance and request for discovery.

Division One addressed the question of how to assess the worth of missing evidence in City of Seattle v. Fettig, 10 Wn. App. 773, 519 P.2d 1002 (1974). That case pertained to the negligent destruction of videotapes that recorded the defendant's performance on field sobriety tests. Id. In reversing Fettig's conviction, the court held:

> The crucial question, then, is whether the video tape was 'material evidence favorable to a criminal defendant.'
>
> The police officer witnesses were permitted to testify as to their observations regarding Fettig's performance on the physical tests. The video tape was a record of that performance, either substantiating or rebutting the officers' testimony. It was therefore material to Fettig's case since the testimony of the officers was the only evidence admitted against him, except the rebuttable presumption of intoxication evidenced by the .12 breathalyzer reading. . . .
>
> [T]he reviewing court need not find that the defendant proved beyond a reasonable doubt that the

> suppressed evidence would have been favorable. To affirm, the reviewing court must find that the trial court would have given 'no weight' to such evidence. . . . It is not necessary to determine whether the 'no weight' test should apply in this jurisdiction. A reasonable possibility that the suppressed video tape tended to rebut the police testimony while corroborating that of the defendant is indicated by the defendant's offer of proof. We therefore hold that the video tape was favorable within the meaning of Brady v. Maryland.
>
> The requirement of Brady that the suppressed evidence be material and favorable to the defendant is satisfied. The negligent destruction of the video tape therefore violated the due process clause of the Fourteenth Amendment.

Id. at 775-76.

The Court of Appeals distinguishes Fettig on the basis that the evidence at issue in that case existed at some point and was destroyed; here, "there is no indication that the records ever existed or that the State was required to have and maintain them." Appendix at 8. A due process violation occurs both when materially exculpatory evidence existed and was destroyed and when materially exculpatory evidence was never properly preserved. For instance, it is difficult to imagine that the state could avoid disclosing that a police officer had previously planted evidence simply by failing to document it. Yet the Court of Appeals' interpretation of Brady obligations seems to permit this precise result, presenting an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

Where Taylor's liberty was at stake, Officer Frank was permitted to estimate regarding Ace's track record and accuracy rate without disclosing the actual records that the state required he maintain on the subject. No records of the up to 14 percent error rate of the dog were disclosed, and no details of those records were available. In Fettig, the court found a due process violation even when it was unclear whether the records would have been favorable to Fettig; here, we *know* that at least some records of Ace's training/performance/identifications would have been favorable, because we know Ace had an error rate. A canine's history of erroneous scent identification is exculpatory evidence. Aguilar, 725 F.3d at 982. These records would have either substantiated or rebutted Officer Franks's claims about Ace, certainly revealing Ace's exact error rate and potentially revealing a greater error rate than estimated or other deficiencies in training performance. The government's failure to disclose or preserve these records, requiring all to take Officer Frank's general estimate as fact, undermines confidence in the outcome of Taylor's trial. Accordingly, the records that Officer Frank was legally obligated to keep and failed to either disclose or preserve constituted material exculpatory evidence. The Court of Appeals decision conflicts with the duty to preserve material and favorable evidence set out in Fettig and thus merits review under RAP 13.4(b)(2).

Because Ace's error rate and the details thereof were materially exculpatory, the state's failure to preserve documentation establishing his error rate—especially when required to do so by former WAC 139-05-915 (7)(a)—violates due process. This due process violation presents a significant constitutional question of law and this court should grant review pursuant to RAP 13.4(b)(3).

E. CONCLUSION

The state presented failed to put forth any evidence corroborating the canine track. The canine's training and performances records were material and exculpatory and the state failed to preserve them. Because he satisfies all RAP 13.4(b) review criteria, Taylor asks this court to grant review and reverse the Court of Appeals.

DATED this 20th day of August, 2018.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. CHARLES MARCELUS TAYLOR, Appellant.	)	No. 76837-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 23, 2018

APPELWICK, C.J. — A jury convicted Taylor of attempting to elude a police vehicle. On appeal, he argues that the evidence was insufficient to support the conviction, and that the State withheld evidence of the canine's performance history in violation of Brady v. Maryland.[1] We affirm.

FACTS

On June 17, 2016, Trooper Adam Gruener ran a search of the license plate of a Honda Accord that was driving eastbound on State Route 518. The search revealed that the Honda had been sold over 45 days before, but title had not yet been transferred as required by law.

Trooper Gruener activated his lights and pursued, but the Honda accelerated. For safety reasons, Trooper Gruener terminated the pursuit a short time later. But, from a distance, he observed the Honda pull into a parking lot.

[1] 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Trooper Gruener followed, located the Honda in a parking lot, and approached the vehicle on foot. He saw a man in a white shirt run away from him

Tukwila Police Officer Brent Frank arrived, along with his canine partner, Ace. Officer Frank and Ace located the suspect roughly 400 yards away. At trial, Trooper Gruener identified Charles Taylor as the suspect apprehended by the canine unit.

Taylor was charged with attempting to elude a pursuing police vehicle, with an endangerment by eluding enhancement. The jury found Taylor guilty of attempting to elude a pursuing police vehicle. But, it was discharged after it was unable to reach an agreement on the enhancement. Taylor appeals.

DISCUSSION

Taylor makes two arguments. First, he argues that the evidence was insufficient to support the conviction, because there was insufficient evidence to corroborate Ace's track and identification. Second, he argues that the State violated Brady by failing to produce or preserve evidence of Ace's training and performance history, and particularly any records of false identifications.

I. Sufficiency of Evidence

Taylor first contends that there was insufficient evidence to corroborate Ace's identification, and therefore there was insufficient evidence to sustain his conviction.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

While dog tracking evidence is admissible to show a defendant's guilt, such evidence, by itself, is legally insufficient to prove identification. State v. Loucks, 98 Wn.2d 563, 567, 656 P.2d 480 (1983); State v. Nicholas, 34 Wn. App. 775, 778, 663 P.2d 1356 (1983). "The dangers inherent in the use of dog tracking evidence can only be alleviated by the presence of corroborating evidence identifying the accused as the perpetrator of the crime." Loucks, 98 Wn.2d at 567. "Corroborating evidence is defined as '[e]vidence supplementary to that already given and tending to strengthen or confirm it.'" Id. at 335 (alteration in original) (citing BLACK'S LAW DICTIONARY 414 (4th ed. 1968)).

Taylor argues that there was insufficient evidence beyond Ace's identification. He argues that Loucks requires reversal. In Loucks, police deployed a canine after a burglary. 98 Wn.2d at 564-65. The canine's track led police to Loucks, who was lying down at the bottom of a stairwell nearby. Id. at 565. Blood and fingerprints at the crime scene did not belong to Loucks. Id. No other evidence suggested that Loucks was at the crime scene. Id. at 566. However, the State's theory was that there was an accomplice, because large furniture was removed, and there were two break-in points. Id. at 568. The Supreme Court found that this

was insufficient to corroborate the canine identification, and thus the canine track and identification, "standing alone," was insufficient to sustain the conviction. Id.

But, in Taylor's case, the canine identification does not stand alone. Testimony linked him with the specific vehicle that eluded police. Danielle McKim was registered as the purchaser of the vehicle in the recent sale. McKim testified that her ex-boyfriend had offered her the vehicle in question, but she had turned down the gift, and her boyfriend continued to drive it. She stated that her ex-boyfriend who had offered her the vehicle had a friend named Charles Taylor. McKim testified that the defendant looked familiar, but stated that she had thought that the person she remembered as Taylor was "a completely different person" than the defendant.

Taylor was arrested at 2:45 a.m., within 30 minutes of the beginning of the dog track, in an empty business park 400 yards from the vehicle, hiding between a knee-high hedge and a closed business building whose parking lot was empty. He had on dark pants and a light colored shirt as the officer described.

The evidence associates Taylor with the vehicle and takes this case beyond the facts of Loucks. It satisfies the corroborating evidence standard, because it " 'tend[s] to strengthen' " the conclusion that Taylor committed the charged crime. Ellis, 48 Wn. App. at 335.

Substantial evidence supports Taylor's conviction for attempting to elude a pursuing police vehicle.

II. Brady Evidence

Taylor next argues that the State wrongfully withheld exculpatory evidence, in violation of Brady. The records that he alleges were wrongfully withheld pertain to Ace's training and performance history. These records would be exculpatory, he claims, because they may show that Ace's identifications tend to be unreliable.

At trial, Taylor sought to exclude canine tracking evidence under Brady, because the State never disclosed any records about the canine's performance history. The trial court ordered the State to produce all materials concerning any prior misidentifications by Ace, but the State represented that no such materials existed, and that Ace had never identified the wrong suspect. The trial court held that the State had therefore met its Brady obligation. And, the court further reasoned that Taylor was free to examine Officer Frank about reliability or any potential history of misidentification. During trial, Officer Frank testified that Ace has a tracking accuracy rate of over 85 to 90 percent. Taylor argues that the evidence of missed tracks is exculpatory, and he should have received records of such evidence.

Under Brady, the suppression by the prosecution of evidence favorable to an accused upon request violates due process, when the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. State v. Mullen, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). Brady obligations extend not only to evidence requested by the defense but also to favorable evidence not specifically requested by the defense. Id. The government must

disclose not only the evidence possessed by prosecutors but evidence possessed by law enforcement as well. Id.

In order to establish a Brady violation, a defendant must establish three things: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) that evidence must have been suppressed by the State, either willfully or inadvertently, and (3) the evidence must be material. State v. Davila, 184 Wn.2d 55, 69, 357 P.3d 636 (2015). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Mullen, 171 Wn.2d at 894. 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 represented that no records of Ace's success or failure in tracking existed. However, Taylor argues that the State was required to maintain such records under former WAC 139-05-915(7)(a) (2016). And, he argues that by not maintaining those records the State deliberately failed to maintain Brady evidence.

Former WAC 139-05-915(7)(a) required law enforcement agencies to "keep training, performance, and identification records on canines." Specifically, the WAC requires the following types of records:

> (i) Microchip number (if applicable);
> (ii) Canine's name;
> (iii) Breed;
> (iv) Training records;
> (v) Certification date;
> (vi) Date acquired or purchased;
> (vii) Source from which the canine was acquired;

> (viii) Purpose, use, or assignment of canine;
> (ix) Handler's name;
> (x) The date and reason the canine was released from service; and
> (xi) Copies of all incident reports in which use of the canine resulted in the use of force.

Id. On its face, the regulation does not require records of success or failure in specific tasks. Id. Only incident reports involving use of force are called out for documentation. Id. Taylor fails to establish that the State was obligated to create and possess records that reflect the success or error rate of the canine.

Taylor argues that Aguilar v. Woodford, 725 F.3d 970, 980 (2013) supports reversal. In that case, the prosecution submitted evidence of a "scent test," where, one month after the crime at issue, the canine associated a scent from a suspects clothes to a vehicle that had been impounded. Id. at 978-79. The State failed to disclose that this canine had made multiple misidentifications in the past, including identifying a suspect that had been in prison at the time that the crime at issue had been committed. Id. at 980. The court reversed the conviction, and reasoned that "[t]here is no doubt that Reilly's history of making erroneous scent identifications is exculpatory evidence." Id. at 982.

This case is distinguishable from Aguilar. There, the evidence showed a documented history that the canine had identified the wrong suspect. Id. at 980. But, here there is no indication that the documentation sought ever existed.

Taylor also argues that City of Seattle v. Fettig, 10 Wn. App. 773, 519 P.2d 1002 (1974) requires reversal. In that intoxicated driving case, the city had destroyed videotape evidence of a defendant's sobriety tests. Id. at 773-74. This left the testifying police officers as the primary witnesses as to the defendant's

intoxication. Id. at 774. This court reversed, because the videotape was corroborating evidence of the officers' testimony and breath test results, were the only remaining evidence of the defendant's intoxication. Id. 776-77. Notably, the court relied on the fact that a district court judge, who had presided on the case at a prior stage and had viewed the video, testified that the videotape negated the impression that Fettig was intoxicated. Id. But, like Aguilar, Fettig is also distinguishable. In Fettig there was no dispute that the exculpatory evidence existed but was destroyed. Here, there is no indication that the records ever existed or that the State was required to have and maintain them.

Taylor has failed to carry his burden to show a Brady violation.

We affirm.

WE CONCUR:

NIELSEN, BROMAN & KOCH P.L.L.C.

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