Supreme Court No. 99224-0
COA 79675-5-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

OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Joel Payne was the appellant in COA No. 79675-5-I.

B. COURT OF APPEALS DECISION

Mr. Payne seeks review of the decision issued August 3, 2020, motion to reconsider denied October 12, 2020. Appendices A, B.

C. ISSUES PRESENTED ON REVIEW

1. The Court of Appeals decision authorizes all law enforcement officers in the State of Washington to enter their department's evidence locker and remove physical evidence collected at the crime scene which may have trace blood or DNA present on it – here, a signet ring belonging to the alleged assault victim - and dispose of that evidence, here, by returning it to the victim. In this case, if the victim's ring had not been disposed of, the defense could have tested it for the *defendant's* DNA, which would contradict the victim's repeated claim at the scene, and at trial, that he was not the aggressor, and that he never punched Mr. Payne in the face. The detective knew on the day of the incident that the case involved a claim of self-defense by Mr. Payne, and knew that Mr. Payne, for unexplained reasons, was *already* bleeding from his face when he encountered the victim that day.

Should this Court accept review under RAP 13.4(b)(3) and decide whether, in fact, any law officer may dispose of "potentially useful

evidence" in this manner, prior to trial, in defiance of a defense request for discovery, and before any defense opportunity to examine the evidence, confident that no Washington court will find that he acted in "bad faith" - despite the fact that his actions violated the written evidence handling rules of the Tukwila Police Department - so long as the officer states that he did not "see" any DNA on the evidence, and so long as he states that he believed the defendant's claim of self-defense would fail at trial anyway?

Or should this Court deny review, and let stand the violation of Mr. Payne's Fourteenth Amendment's Due Process rights under Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)?

2. Did the Court of Appeals miscomprehend the difference between material exculpatory evidence and potentially useful evidence, and rule, by misreading decisions of the Supreme Court, that a police officer does not act in bad faith by disposing of evidence unless the exculpatory value of the evidence was apparent to him when he did so? Or is this reasoning erroneous, and a misunderstanding of Youngblood, where it applies to the higher category of evidence - that which carries obvious material exculpatory value on its face, and as to which therefore, if lost by the police, Due Process is violated regardless of the officer's bad faith or good faith?

3. Was the Court's reasoning similarly a miscomprehension of the definition of "potentially useful evidence" – such as the ring here – which

is evidence that, if subjected to testing, could be found to carry potentially exculpatory value?

4. Did the Court of Appeals misapply the law of the case doctrine?

5. Did the Court of Appeals erroneously apply Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in rejecting Mr. Payne's post-trial motion that the evidence was insufficient?

D. STATEMENT OF THE CASE

Mr. Payne's argument addressing the Court of Appeals' erroneous ruling that his Due Process argument is barred by the law of the case doctrine contains in itself a *precis* of the procedural history and a significant portion of the pertinent substantive facts of the case. The remaining facts of the case are set forth in Mr. Payne's arguments as to why review should be granted. In addition, the facts are set out in detail in Mr. Payne's Opening Brief and Reply Brief in the Court of Appeals, and the Court of Appeals decision in COA No. 79675-5-I.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

I. DUE PROCESS WAS VIOLATED BY BAD FAITH LOSS OF POTENTIALLY USEFUL EVIDENCE.

(1). Review is warranted under RAP 13.4(b)(3). The Court of Appeals decision as to the Due Process violation of the lost evidence presents an important issue under the United States Constitution, Amendment XIV. RAP 13.4(b)(3).

(2). The Court of Appeals erroneously ruled that Mr. Payne's Due Process argument was barred by the law of the case doctrine.

Mr. Payne's original counsel moved, pre-trial, to dismiss the case based on Detective Eric DeVries' act of giving the evidence of the signet ring back to the victim, depriving the defense of the ability to test it for Mr Payne's DNA. Based on the prosecutor's statement that the detective gave the ring away because he did not think it had any DNA evidence on it and believed that the defendant had been the aggressor anyway, the trial court denied the motion, deeming the the ring to not be potentially useful evidence, and finding that the detective did not act in bad faith. CP 11-12; 1/28/16RP at 67-86.

During the trial, further evidence on the matter was developed – including testimony by the detective himself as to his reasons for giving the ring away, and evidence that the ring was located on the ground by police – suggesting that Atkins had in fact been punching Mr. Payne in his face, which he denied ever doing. 2/24/16RP at 936-38; see 2/8/16RP at 274-76 (testimony of Atkins). Mr. Payne was convicted by the jury.

Mr. Payne appealed, and the Court of Appeals rejected his Youngblood argument; this Court denied review. However, the Court of Appeals did order remand to the trial court, because Payne's newly-appointed post-trial counsel had failed to properly file a motion for new trial raising the issues Mr. Payne wanted to raise, and instead filed an Anders

brief, which is not permitted in the trial court. COA No. 75503-0 (decided March 26, 2018).

On remand, Mr. Payne's new post-trial lawyer raised the Youngblood issue based on the additional evidence that had became known during trial, and based on further investigation, not conducted by trial counsel, that indicated that the detective's conduct violated *written* evidence-handling procedures supposedly followed by the Tukwila Police Department. The trial court denied the motion, and on appeal, the Court of Appeals, in No. 79675-5-I , determined that the issue was barred under the law of the case doctrine. Appendix A (Decision, at pp. 4-8). Although the Court of Appeals did also address the substantive argument, its decision that there was no Due Process violation was in error, and this Petition for Review follows.

The law of the case doctrine simply does not apply to this appeal from an entirely new trial court hearing, and ruling, than the pre-trial motion that was the subject of Mr. Payne's first appeal. The Court of Appeals wrongly applied the doctrine. This was not a matter that the Court had already determined on appeal. The law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844

(2005). This was an appeal from a different proceeding, based on a new, different set of facts. On remand from the Court of Appeals after Mr. Payne's first appeal, Mr. Payne's new lawyer Don Minor finally did what Payne's prior lawyers had failed to do - raised the post-trial Youngblood issue, seeking to reverse and dismiss, relying on all pertinent existing information, including information adduced at trial, and by properly preparing and investigating the matter. Mr. Payne has the right to appeal from that trial court proceeding, under article I, section 22 of the Washington Constitution. State ex rel. Gray v. Webster, 122 Wash. 526, 530, 211 P. 274 (1922).

Further, the law of the case rule, codified by RAP 2.5(c)(2), is discretionary. Roberson, 156 Wn.2d at 42. The Court of Appeals should have addressed the issue because application of the doctrine should be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to Mr. Payne. Roberson, at 42. Additionally, the Court should address an issue in a subsequent appeal if there is a substantial change in the evidence at a second determination of the cause. Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). Here, as noted below, Mr. Payne's new lawyer relied on new evidence, which had been elicited at trial, and further evidence secured for the post-trial motion – in the form of trial testimony by the detective, trial

testimony by a forensics expert, and evidence, secured post-trial by Mr. Minor, of the written evidence handling regulations that were violated.

(3). <u>Mr. Payne's Due Process rights were violated</u>.

The trial court should have dismissed the charges against Mr. Payne at the post-trial motion, based on the police failure to preserve potentially useful evidence, in violation of Due Process, which Payne's new lawyer set forth at the post-trial motion. CP 81-96, 1092-1102, 1133-1161.

Mr. Payne's new counsel provided the court with the Tukwila Police Department General Orders 83.2.1(I) and (IV) and 83.3.1(I), (II), regarding collection, storage and custody of evidence, which state that "[t]his order requires that evidence at a crime scene is protected, collected, and packaged properly," and that any transfer of physical evidence will be documented. CP 1146. Those rules further provided, under General Order 84.1.1(I) and (II) regarding departmental possession, care, and control of evidence, that it "is the duty of all department personnel to care for, control, and correctly process all evidence . . . which comes into their possession in the course of their official duties." CP 1151.

The post-trial hearing court correctly noted that a failure to preserve "potentially useful" evidence "only violates due process if the defendant can show the State acted in bad faith." 1/18/19RP at 51. The court then reasoned that "bad faith turns on the police knowledge of the exculpatory

value of the evidence" at the time it is lost, and "we don't have anything that suggests that the police knew of the exculpatory value and so that argument is rejected here." 1/18/19RP at 51-52. The court also stated that the case of State v. Groth, 163 Wn. App. 548, 261 P.3d 183 (2011), refers to a failure to preserve evidence "that's contrary to policy" as probative of bad faith, but held that the defendant must still demonstrate bad faith, "and that is not present here." 1/18/19RP at 52.

This was error. Due Process is violated, requiring dismissal of criminal charges with prejudice, where the police cause evidence that is potentially useful to the defense to be lost or destroyed, if the police acted in "bad faith." U.S. Const. amend. XIV; Arizona v. Youngblood, 488 U.S. at 57-58; State v. Wittenbarger, 124 Wn.2d 467, 474-77, 477, 880 P.2d 517 (1994).

Whether the loss or destruction of evidence violates Due Process depends on the nature of the evidence. Wittenbarger, 124 Wn.2d at 475-77. There are two levels of possible Due Process violation:

> 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. The signet ring in this case was "potentially useful" evidence. The definition of potentially useful evidence is evidentiary material which, if it had not been lost, "could have been subjected to tests, the results of which might have exonerated the defendant." (Emphasis added.) 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." (Emphasis added.) 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)). If evidence meets the *higher* Trombetta category, the defendant need not show its loss was a result of bad faith, but is entitled to dismissal simply upon the loss of the evidence, regardless of how it was lost. Wittenbarger, at 475-77; see Owens v. Baltimore City State's Attorneys Office, 767 F.3d 379, 396 n. 6, 398 (4th Cir.2014); United States v. Bohl, 25 F.3d 904, 912 (10th Cir.1994).

Here, the evidence was potentially useful and Mr. Payne must, and did, show bad faith. The trial court wrongly applied principles applicable to plainly exculpatory evidence to this case, which involves potentially useful evidence.

(i). A determination that this was bad faith disposal of evidence is supported, rather than defeated, by the State's claim that the ring was given away because no DNA or blood was visually apparent on it.

This was a case of assault, with a known defense to be raised by Mr. Payne of self-defense, regardless of the police assessment of the merits of that 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 the defendant's facial injuries and bleeding had been "pre-existing.").

As Mr. Payne argued, Mr. Atkins' signet ring could have been tested for Mr. Payne's blood or DNA or other material that would show that Mr. Atkins was lying when he said he did not ever punch Mr. Atkins in the face, and this evidence would strongly corroborate Mr. Payne's defense of self-defense, which the State was required to disprove. 1/18/19RP at 43-48; see CP 92-94 (Motion for arrest of judgment and new trial, at pp. 12-14).

The trial court in its January 2019 ruling reasoned that "we don't have anything that suggests that the police knew of the exculpatory value." 1/18/19RP at 51-52. But the known facts of the case at the time of disposal of the evidence – which included a claim of self-defense and police investigation into that matter by examining Mr. Atkins' hands – made clear that all evidence, including evidence of self-defense, was crucial in the case. Other Tukwila police officers plainly understood the importance of a careful

effort to secure and retain evidence which could be useful. 2/9/16RP at 453-55, 459, 461-63 (testimony of Sergeant Sanjay Prasad regarding team of officers collecting physical evidence). For example, Detective Ron Corrigan testified that he obtained DNA swabs from the accuser Mr. Atkins, and took photographs of Atkins' hands, because this is evidence relevant to an assault trial arising out of the fight. 2/10/16RP at 619-26.

Indeed, as soon as the case was investigated, police officers correctly understood not only that this was likely to be a self-defense case, but they also treated the signet ring as evidence that was potentially useful. 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 secure storage. 2/10/16RP at 545-47; Exhibit list, 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.

Notably, at trial, 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. It is for these sorts of reasons, as the Tukwila Police Department's own evidence manual indicates, that preservation of evidence is one of the most important

aspects of a forensic investigation into criminal cases. See CP 1150 (General Order 83.3.2(II) (requiring that officers follow the standards of this order and the Washington State Patrol Physical Evidence Handbook); CP 1152 (General Order 84.1.1(VII) (requiring that evidence of jewelry be packaged separately, and that biological evidence be handled in accordance with the WSP Physical Evidence Handbook).

The Washington State Patrol Physical Evidence Handbook makes it abundantly clear that biological evidence such as "usable DNA" may be contained on items such as "jewelry" and these items must be preserved so that they can be subjected to the scientific tests necessary to that determination. See WSP Physical Evidence Handbook (2006),[1] at part 4-4; see also part 6-1 ("Small, often microscopic, quantities of material have always been of interest to crime scene investigators. These particles can be the key to a successful investigation. An individual or object leaves behind and/or picks up traces of materials from another person or an environment, however brief and slight the contact"); part 7-1 ("If the firearm is to be processed . . . caution is necessary not to smear or destroy the prints and not to wipe off or contaminate potential DNA on the firearm "); part 8-1 ("Handle the tool with gloves, as DNA might be recovered from a tool left

[1] Available at http://www.justiceacademy.org/iShare/Library-Training/Wash%20State%20Manual.pdf.

at the scene"); Preface, at page II ("We are now able to conduct examinations that were not developed when the earlier editions were published—for example, DNA analysis on much smaller evidence.").

In the circumstances of this case, to reject an argument of bad faith, simply by reasoning that no evidentiary material could be visually seen on Mr. Atkins' signet ring, is contrary to understood police forensic principles, along with being an incorrect application of the two-tiered Due Process law of loss of evidence. The cases indicate that the Youngblood standard for potentially useful evidence is particularly applicable to latent evidence - that which *cannot* be assessed as exculpatory by merely 'looking at it.' Thus, the Youngblood standard usually applies to evidence which must be subjected to scientific testing in order to ascertain its exculpatory value. See, e.g., Youngblood, 488 U.S. at 54 (semen samples); United States v. Bohl, supra, 25 F.3d at 910-11 (chemical composition of steel). The Trombetta standard, on the other hand, best applies to material exculpatory evidence - the exculpatory nature of which is plainly apparent by unaided human observation. California v. Trombetta, 467 U.S. at 489.

The bad faith requirement does not mean that Mr. Payne must show that the police were able to visually see blood or DNA on evidence before they caused it to be lost. This confuses the Due Process standard for material exculpatory evidence (which plainly exculpates the defendant),

with that for *potentially* 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, if it had been preserved for testing). Thus, the federal courts have stated:

> To invoke Trombetta, a defendant must demonstrate that the government destroyed evidence possessing an "apparent" exculpatory value. Trombetta, 467 U.S. at 489, 104 S.Ct. at 2534. However, to trigger the Youngblood test, all that need be shown is that the government destroyed "potentially useful evidence." Youngblood, 488 U.S. at 58, 109 S.Ct. at 337.

United States v. Bohl, 25 F.3d at 910. What matters here is that the evidence indeed could be helpful to the defense – if tested and examined. For example, lost videotape evidence of the very crime scene itself could be inculpatory, or exculpatory, 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, Randelle Atkins stated he did not ever strike Mr. Payne's face, and there were no witness statements, or physical evidence on Atkins' hands, that he did so. CP 5 (affidavit of probable cause). By the time of the motion to dismiss, Mr. Payne had discovered a possible witness, Mandeep Chawla, who could testify that he saw Atkins punch Payne in the

body at some point, but the State was continuing to counter that Atkins, as he said in his pre-trial interview, did not do so. 1/28/16RP at 69-70, 75; CP 10-12 (defense pre-trial briefing). 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).

Detective DeVries himself admitted at trial that any trace DNA of Mr. Payne present on Atkins' ring would *not* be visible. 2/10/16RP at 562-63. Yet, despite all of this, DeVries did *worse* than recklessly allowing the evidence to be lost to the wind – rather, he *gave it* to Mr. Payne's accuser, the party plaintiff.

(ii). The loss of evidence in the face of a request to preserve evidence is highly probative of bad faith.

On October 22, 2014, Mr. Payne's counsel filed a "Notice of Appearance and Request for Discovery." CP 1206-11 (Notice of Appearance and Request for Discovery, demanding, *inter alia*, that the Prosecutor "preserve all physical evidence . . . until final disposition of this cause."). This filing could be no surprise to any actor in the justice system. See CrR 3.1 (assignment of lawyer); CrR 4.7. Notably, the courts have,

properly, distanced themselves from requiring a request to preserve evidence before "bad faith" will be found in the loss of potentially useful evidence at the hands of police. See Trombetta, 467 U.S. at 485 (rejecting notion that the duty to preserve and provide helpful evidence turns on the question whether the defense asked the State to not dispose of the evidence) (citing United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

It stands to reason, however, that disposal of evidence, in the face of a request for preservation of evidence, is probative of bad faith. See, e.g., State v. Boyd, 29 Wn. App. 584, 588, 629 P.2d 930 (1981); Kordenbrock v. Scroggy, 889 F.2d 69, 85 (6th Cir.1989) (destruction of tape of confession after transcription impermissible if defense counsel specifically requested preservation); cf. United States v. Richard, 969 F.2d 849, 853-54 (10th Cir.1992) (rejecting the appellant's allegation that the government destroyed evidence in bad faith, because the appellant failed to proffer any evidence that the government knew the appellant wanted certain boxes containing marijuana preserved for trial), cert. denied, 506 U.S. 887, 113 S.Ct. 248, 121 L.Ed.2d 181 (1992).

The request to preserve evidence, filed by Mr. Payne's counsel as part of the notice of appearance, was by definition generalized. But the police gave away the signet ring to the party plaintiff in this case so quickly

that the defense had no time to make a more specific request to preserve this particular piece of evidence. Counsel, instead, relied on the reasonable belief that officers of the Tukwila Police Department would surely give away evidence to the opposing party.

There can be no question that the existence of a defense request for preservation of evidence is yet another building block on the bridge to Mr. Payne's demonstration of "bad faith" in this case. See also People v. Newberry, 652 N.E.2d 288, 292 (Ill. 1995).

(iii). Releasing evidence to an interested party in a specific case is further highly probative of bad faith where it is contrary to specific rules and policy, and contradictory to any police officer's common sense duty in a criminal case.

Where evidence is genuinely mistakenly lost or destroyed as a result of following established police procedures, this is probative of police good faith, which defeats a Youngblood claim. State v. Ortiz, 119 Wn.2d 294, 302, 303-04, 831 P.2d 1060 (1992) (bad faith will not be found where evidentiary samples were accidentally destroyed by handling in "the usual manner."). Likewise, failing to act in accord with evidence collection practices or reasonable common sense treatment of evidence that any officer should be expected to follow, is probative of bad faith. United States v. Elliott, 83 F.Supp.2d 637, 645-47 (E.D.Va.1999).

Here, the rules were and written. Tukwila Police Department General Order 84.1.1(IX) allowed evidence to be released to its owner only "if, and when . . . one or more of the following criteria has been met:

a. authorization of the prosecuting attorney's office.
b. the case has been adjudicated, and, if applicable, the period for appeals has been closed and all pending appeals have been concluded.
c. the case exceeds the statute of limitations.
d. in accordance with RCW 63.32.010.

CP 1153 (Tukwila Police Department General Order 84.1.1(IX)). These rules were applicable to the Tukwila Police Department under numerous iterations, all clearly indicating that release of evidence to a party to a criminal case prior to resolution of the case was plainly prohibited. See generally CP 1156-61 (Manual).

The police conduct in this case, of giving evidence in a pending criminal prosecution to an interested witness in violation of the police department's own rules, is highly probative of bad faith, and under all of the circumstances, bad faith was conclusively demonstrated below. It is impossible to believe that these facts show anything less than clear bad faith, even absent specific regulations. No trained police officer would release collected evidence to an interested party, while trial on a felony assault charge is pending, without at least notifying the defense beforehand. See generally United States v. Deaner, 1 F.3d 192, 200 (3rd Cir.1993) (failure to follow evidence practices is probative of bad faith); United States

v. Montgomery, 676 F.Supp.2d 1218, 1244 (D.Kan. 2009) (granting *habeas* petition where defense counsel failed to move to dismiss prosecution for possession of marijuana plants when government destroyed plants without photographing or videotaping them, violating DEA practice).

But here, when it came to the signet ring, the Department's written rules for retaining physical evidence, as officially set down, were ignored, in addition to the detective acting contrary to the standards of any law enforcement officer. 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 certainly had a reasonable expectation that the police do not simply give away collected evidence in a criminal case that has just recently been charged. 1/28/16RP at 84 (defense argument that it defied logic and prevented defense counsel from doing her job for police to release collected evidence because of their unilateral decision that their investigation proved the defendant was the attacker).

(iv). Under all these circumstances, Detective DeVries caused the evidence to be lost in "bad faith."

The correct rule is that the inquiry into whether potentially useful evidence was lost in bad faith turns on the the government's knowledge of the *potentially* exculpatory value of the evidence at the time it caused it to be destroyed. Youngblood, 488 U.S. at 57; United States v. Zaragoza-Moreira, 780 F.3d 971, 978-79 (9th Cir.2015). Whether Due Process is

violated depends on the police knowledge of the attendant circumstance of the required helpful nature of the evidence, under either Trombetta (for clearly exculpatory evidence) or the Youngblood standard (for the potentially useful evidence at issue here). 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).

This ignoring of official evidence handling regulations, the giving away of evidence in the face of a request to preserve all evidence, in a case where the detective knew from the very outset that the case would involve a claim of self-defense, done without notice to the defense because the police disbelieved one party over another, while knowing that evidence of this sort would have to be examined by testing rather than the naked eye, establishes a panoply of multiple conscious violations of accepted practice and official procedure that thoroughly establish "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).

Due Process required the trial court to grant Mr. Payne's post-trial motion. U.S. Const. amend. XIV. This Court should reverse Mr. Payne's convictions and dismiss the charges against him with prejudice.

II. THE EVIDENCE AT MR. PAYNE'S TRIAL WAS INSUFFICIENT TO PROVE THE CRIME BY ALL MEANS CHARGED.

(1). Review is warranted under RAP 13.4(b)(3). The Court of Appeals decision as to the evidentiary sufficiency presents an important issue under the United States Constitution, Amendment XIV. RAP 13.4(b)(3).

(2). Requirement of sufficient evidence on the offense and all means of commission of the offense.

In his CrR 7.5 motion below, Mr. Payne argued that the State failed to prove (1) intent to cause great bodily harm, and/or (2) failed to prove that great bodily harm was caused, because of the absence of evidence of such harm. CP 83 (Motion to arrest judgment, at pp. 83-84 and n. 6 (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), and Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)), pp. 1093-94). Review of the issues is *de novo*. State v. Ramirez, 432 P.3d 454, 459 (Wash. Ct. App.), review denied, 193 Wn.2d 1025, 445 P.3d 567 (2019) (cited pursuant to GR 14.1) (citing State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014) and State v. Berg, 181 Wn.2d 857, 867, 337 P.3d 310 (2014)).

The failure of proof requires reversal. As the jury was instructed, the State was required to prove that the defendant acted with intent to inflict great bodily harm and that the assault was committed with a deadly weapon or by force or means likely to create great bodily harm or death, or that he

acted with intent to inflict great bodily harm and the assault resulted in the infliction of great bodily harm. Jury instruction no. 7.

(3). The evidence was insufficient.

However, the State did not prove either. "Great bodily harm" encompasses the most serious injuries short of death. State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); see Jackson, supra; U.S. Const. amend. XIV. "Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c); jury instructions (instruction no. 11).

Dr. Wayne Lau, the general surgeon at Valley Medical, treated Mr. Atkins when he presented with a stab wound to the left chest. 2/10/16RP at 474, 481. In total, despite what might be an average person's sense of the seriousness of a knife wound and the technical medical language of the doctor's description, the injury to Atkins completely failed to show "great bodily harm." After some diagnostic tests by one Dr. Lieberman, and one Dr. Lepine, Dr. Lau saw Atkins had a wound two centimeters in diameter with a laceration to his lung of a depth of about 5 centimeters, along with a

partially collapsed lung and some air and blood in the pleural space (a space around the lung), which is called a hemopneumothorax. 2/10/16RP at 481-82, 484-85, 487 (also discussing the CAT scan as the basis for these determinations). A chest tube was inserted into Atkins' chest cavity to help evacuate the blood and to reexpand his left lung. 2/10/16RP at 482.

Once such a "leak has sealed," a person will be stable to go home. 2/10/16RP at 482, 484 (describing a leak as the fact of the wound going into the lung tissue). When asked what the danger would be if the lung was not expanded in this manner, the doctor noted that "the patient would have difficulty breathing." 2/10/16RP at 482. A young person such as Atkins could "potentially do well in terms of surviving on one lung, but he would be short of breath and wouldn't be able to do his normal activities and so forth." 2/10/16RP at 482-83. When asked if this lung collapse would be permanent injury, Lau stated that "[h]e just would not have normal functioning." 2/10/16RP at 483. But Dr. Lau's job at that point was to make sure that Atkins' lung remained inflated so he could have the tube removed and he could go home, and indeed Lau did, and indeed home Atkins went. 2/10/16RP at 483-84.

Before Atkins' discharge less than 48 hours after he arrived, the doctor confirmed that his lung had reexpanded so the chest tube was removed. 2/10/16RP at 485-86. Dr. Lau indicated that the penetrating

wound Atkins did suffer was "not a superficial wound," such as a slashing wound. 2/10/16RP at 489-90. And Lau indicated the biggest concern one would have with this sort of injury would "be if there was a massive amount of blood, which there was not." 2/10/16RP at 484.

Looking to all the testimony, there was no injury that created a probability of death, nor was there any permanent disfigurement or permanent loss of impairment. It is not surprising in these circumstances that the prosecution subjected Dr. Lau to questions about injuries that had not occurred, and about locations that were not the locations of the wound. For example, the doctor agreed that "if this knife had penetrated the heart," which it had not, such injury could be a "[p]otential fatality. Could be a lethal injury." 2/10/16RP at 488. But the wound was five or six centimeters from the heart. 2/10/16RP at 488. It could also be "potentially a lethal blow" if the wound had been to the blood vessels that supply the arm, and this might cause the loss of use of an arm - but this was not such an injury. 2/10/16RP at 489. Dr. Lau stated that Mr. Atkins was lucky, because if the injury had been "[t]hree inches one way or the other, he would have been much more seriously injured. Potentially, again, this could have been a fatal injury." 2/10/16RP at 490. But of course, Mr. Atkins did not have a wound in either of the afore-described areas. 2/10/16RP at 490. Thus, the evidence was not rendered sufficient by the

fact that Dr. Lau answered "yes" when the prosecutor inquired, "could a stab wound of this type to that area of a person's body create a probability of death?" 2/10/16RP at 490-91. Neither the heart, nor the blood vessels supplying the arm, *were* "that area" which was wounded. The prosecutor also asked about probabilities as to "permanent impairment of the function of a bodily organ." 2/10/16RP at 491. The doctor answered yes when asked, "could a stab wound to this area of a person's body create a probability" of such impairment or disfigurement, and the doctor said yes. 2/10/16RP at 491. Probability of impairment does not meet the statute. Indeed, on cross-examination, Dr. Lau once again, and equally as clearly, stated that "the depth of the wound could certainly have caused serious injury." 2/10/16RP at 496. But, serious injury is not great bodily harm.

And Dr. Lau was even more clear when he agreed that although Mr. Atkins "would need" to return to have the stitches removed from where the doctor had inserted the chest tube, "with regard to lung function he would be back to baseline in a few months." 2/10/16RP at 497 (and also testifying that Atkins "should have had full return of his lung function" as a result of his treatment. 2/10/16RP at 497.

The evidence fails in all respects. Reversal is required. Jackson v. Virginia, 443 U.S.at 318 (insufficiency of the evidence); State v. Green, 94 Wn.2d at 235 (absent showing whether aggravated first-degree murder was

committed in furtherance of kidnapping or rape, it was necessary to remand cause for a new trial). Only if the evidence is sufficient to support the entire statute as charged under alternative means is affirmance possible. Wash. Const. art. 1 sec. 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

Further, there was no adequate proof of intent to inflict great bodily harm. Intent to inflict great bodily harm was lacking where Mr. Payne described, vaguely, that when Mr. Atkins attacked him, Payne "went like this," and realized that he had hit Atkins in his chest. 2/10/16RP at 790-91. For his part, Atkins stated that Payne started yelling at him that Mr. Atkins had stolen his laptop or his books, and when he turned around, the defendant stabbed him in the chest. 2/4/16RP at 197-99, 201-02. But first degree assault requires proof of specific intent, which is intent to produce a specific result: in the case of first degree assault, to inflict great bodily harm. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). In determining intent, the "jury may consider the manner in which the defendant exerted the force and the nature of the victim's injuries to the extent that it reflects the amount or degree of force necessary to cause the injury." State v. Pierre, 108 Wn. App. 378, 385, 31 P.3d 1207 (2001). Specific intent may not be presumed, although the jury may infer it "as a

logical probability from all the facts and circumstances." State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

Here, no rational jury could find that Mr. Payne, either in a flurry of anger and fear that Atkins was somehow the person who previously stole from him, or even if without justification he merely swung at and struck Atkins' chest once with a knife, that he intended great bodily harm. Dr. Lau noted that if the knife had hit a rib of Mr. Atkins' chest, there would have been no penetration of the lung and even less injury. 2/10/16RP at 495-96. There was no adequate proof of intent under the Fourteenth Amendment Due Process clause. U.S. Const. amend. XIV.

F. CONCLUSION

Based on the foregoing, this Court should accept review, and reverse Mr. Payne's judgment and sentence.

Respectfully submitted this 12th day of November, 2020.

s/ Oliver R. Davis
Washington Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98102
Telephone: (206) 587-2711
E-mail: Oliver@washapp.org

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JOEL EDWARD PAYNE, Appellant.	)	No. 79675-5-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — This is the second appeal arising from Joel E. Payne's convictions for assault in the first degree while armed with a deadly weapon and malicious harassment stemming from the 2014 stabbing of Randelle Atkins. In Payne's first appeal, we reversed and remanded because Payne was denied his right to counsel in post-trial proceedings and the court erred in calculating his offender score. On remand, the court appointed counsel for Payne and after conducting several hearings on the merits, denied his motion to set aside the verdict and resentenced Payne. Payne now appeals the court's denial of his post-judgment motion challenging the verdict. Finding no error, we affirm.

FACTS

According to the testimony at Payne's trial, Atkins went shopping alone at Southcenter Mall on October 10, 2014. After leaving the mall, he decided to stop at a small convenience store before returning to his vehicle. As he walked to the

store, Atkins noticed a man walking toward him wearing a mask that completely covered his face. Atkins and the man passed within a foot of each other.

When he left the store, the same man, who was now wearing the mask on top of his head, approached Atkins. Atkins noticed that the man's face was bruised and "kind of messed up." The man, later identified as Payne, accused Atkins of previously stealing from him and began to loudly yell racial slurs. Atkins was using his telephone, ignored Payne, and attempted to walk past him. Payne followed him. Then, Atkins, who was holding his phone in one hand and a shopping bag in the other, felt that someone was about to touch him and turned around, raising his arms to try to create space. Payne stabbed Atkins in the chest and then fled on foot.

Atkins did not immediately realize he had been stabbed, but when he turned and entered an AT&T store, people looked at him and screamed. He looked down and saw that he was bleeding heavily. Atkins dropped the items he was carrying and asked bystanders to call the police. An ambulance arrived and medics inserted a chest tube into Atkins' lung at the scene and transported him to the hospital.

Shortly after, a Sears employee found Payne hiding in a storeroom. Payne explained that he was hiding from a man who was armed with a gun and asked the employee not to tell anyone he was there. The employee noticed bruises and cuts on Payne's face. The employee notified a loss prevention officer, who called the police. Several officers gathered to search the storeroom. Following a brief physical confrontation, they arrested Payne. In a search incident to his arrest, they

found two knives in his pocket. One of the knives appeared to have blood on the blade. Police also found a backpack in the storeroom containing various items, including a mask.

Detectives searched the area outside the store where the stabbing occurred and found, among other things, a ring that Atkins had been wearing at the time of the incident. The detectives photographed, packaged, and placed the ring in evidence along with other items from the scene. Police interviewed Atkins at the hospital shortly after the incident, photographed his hands, and collected a Deoxyribonucleic acid (DNA) sample. A forensic scientist later analyzed the blood from the knife and determined that it matched the DNA from a sample taken from Atkins. The photographs did not depict any injuries to Atkins' hands.

About a week after the stabbing, Atkins called the lead detective and asked if his cell phone, eye glasses, and ring could be returned to him. Because the items had been photographed and he concluded that they did not have any evidentiary value, the detective returned the items to Atkins.

Payne brought a pretrial motion to dismiss based on the State's release of the ring to the victim before Payne had an opportunity to have it tested for the presence of DNA. Payne argued that the presence of his own DNA on the ring would have supported his claim of self-defense by refuting Atkins' claim that he never hit him. The court denied the motion. In February 2016, a jury convicted Payne as charged of assault in the first degree and malicious harassment. The court imposed a standard range sentence.

Payne appealed his convictions and sentence and claimed 1) the release of the ring to Atkins deprived him of the opportunity to test the ring and violated his right to due process; 2) the court violated his right to a public trial; 3) he was deprived of the right to counsel in post-trial proceedings; and 4) the trial court erred in calculating his offender score. We rejected Payne's due process and public trial claims, but agreed that his offender score was miscalculated and that he was deprived of the right to counsel. We reversed and remanded for post-trial proceedings with appointed counsel.

On remand, Payne filed a motion for arrest of judgment and/or a new trial. He raised over thirty grounds for relief, including an alleged due process violation related to the failure to preserve the ring as evidence, insufficiency of the evidence, and numerous claims of ineffective assistance of counsel, prosecutorial misconduct, and trial court error. Over the course of two hearings, the court denied each of Payne's motions. The court then resentenced Payne and again imposed a standard range sentence based on a reduced range. He timely appealed.

ANALYSIS

I. Due Process

Payne asks this court to revisit our decision in his prior appeal. Based on the law of the case doctrine, we decline to do so.

In Payne's first appeal, we concluded that, although the police initially placed the victim's ring into evidence, the release of the ring to Atkins before trial did not violate Payne's right to due process. See State v. Payne, No. 75503-0-I at

slip op. at 3 (Wash. Ct. App. March 26, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/755030.pdf. We assumed for purposes of our analysis that the ring was "potentially useful evidence"—meaning that it "'could have been subjected to tests, the results of which might have exonerated the defendant.'" State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183 (2011) (quoting Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). A police officer's failure to preserve such evidence violates due process only if the defendant can show bad faith, an inquiry that turns on the officer's knowledge of the exculpatory value of the evidence at the time it is lost or destroyed. See Groth, 163 Wn. App. at 588; State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001). We held that Payne failed to meet his burden to prove that the lead detective was aware of the ring's exculpatory value and therefore acted in bad faith when he released it to its owner. Payne, slip op. at 3.

Having determined a legal issue on appeal, we will not ordinarily reconsider the issue in a later appeal in the same litigation. "In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The doctrine promotes finality and efficiency. State v. Schwab, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008).

The rule, codified by RAP 2.5(c)(2), is discretionary. Roberson, 156 Wn.2d at 42. The rule codifies "two historically recognized exceptions to the law of the case doctrine that operate independently." Id. "First, application of the doctrine

may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party." Id. "Second, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal." Id. There is also authority to suggest that we may reconsider a legal issue in a subsequent appeal if there is a "'substantial change in the evidence at a second determination of the cause.'" Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (quoting Adamson v. Traylor, 66 Wn.2d 338, 339, 402 P.2d 499 (1965).

Neither party addresses this doctrine.[1] Consequently Payne does not address the circumstances under which we may exercise our discretion to revisit a legal determination in a subsequent appeal. Nevertheless, at the superior court hearing on Payne's post-trial motion, he argued that our decision did not foreclose renewal of his due process claim because of new evidence that was not before this court. Specifically, in support of his motion for a new trial on remand, Payne supplied evidence of the specific policies that governed the Tukwila Police Department's collection, preservation, and release of evidence at the time of the crime. According to these policies, returning the ring to Atkins before the matter was adjudicated at trial required approval of the prosecuting attorney's office and documentation. The State does not appear to dispute that the detective did not comply with these policies when he released the ring.

[1] The State asserts that either res judicata or collateral estoppel precludes Payne from raising the issue on appeal regarding the failure to preserve evidence. Because we apply the law of the case, we need not address the applicability of either of these "closely related" doctrines. Roberson, 156 Wn.2d at 41.

The new evidence of the police department's policies does not warrant reconsideration of Payne's claim. In rejecting his claim in the first appeal, we noted Payne's failure to demonstrate a violation of a particular regulation or explicit policy. But as our decision makes clear, this fact was not critical to our determination. As we explicitly observed, a loss or destruction of evidence that is in violation of clear policy, does not, of itself, constitute bad faith. Payne, slip op. at 3; See Groth, 163 Wn. App. at 559.

The basis for our decision was the lack of evidence in the record of bad faith. It is well established that as to potentially useful evidence, we apply the analysis of the United States Supreme Court, which requires a defendant to show that the failure to preserve evidence was more than merely negligent and provides that the presence or absence of bad faith hinges on "knowledge of the [apparent] exculpatory value of the evidence." Youngblood, 488 U.S. 56, n.* (alterations in original). For example, Youngblood involved the police's handling of a rape victim's clothing. Id. at 53-54. Semen stains on the clothing could have possibly exonerated the defendant had the clothes been tested sooner or been refrigerated. Id. at 57-58. However, the Court held that the police actions did not amount to bad faith because failure to perform tests was, at worst, negligent. Id. at 58. In other words, the police's failure to realize the potential usefulness of the evidence before it was destroyed is insufficient to show bad faith.

Payne challenges our determination that the evidence does not show that the detective was aware of the potentially exculpatory value of the evidence when he returned it to the victim. But his arguments in this regard are essentially the

same as those we considered and rejected when we resolved his first appeal. Having decided Payne's due process claim, we see no clear error in our previous decision which might indicate injustice and no reason to depart from our reasoning. We therefore decline to revisit his claim.

II. Sufficiency of the Evidence

Payne challenges the sufficiency of the evidence to support his conviction of assault in the first degree.

To resolve such a challenge, we view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. Id. We deem circumstantial and direct evidence equally reliable. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Nevertheless, inferences based on circumstantial evidence must be reasonable and not based on speculation. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The trier of fact, not the reviewing court, resolves credibility determinations. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

First degree assault is an alternative means crime and here, the State charged Payne with two alternative means. As charged, the State was required to prove that, "with intent to inflict great bodily harm," Payne either (1) assaulted Atkins with a "deadly weapon or by a force or means likely to produce great bodily

harm or death;" or (2) committed an assault that "resulted in the infliction of great bodily harm." RCW 9A.36.011(1)(a), (c). Great bodily harm is defined as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). When the State charges alternative means, the jury must unanimously agree that the crime occurred but need not be unanimous as to which of the alternative means has been proved so long as sufficient evidence supports each alternative. State v. Woodlyn, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017).

Payne claims the State failed to prove that he acted with intent to inflict great bodily harm. He points out that the stabbing happened quickly. And he claims that evidence of a single strike with a knife is not indicative of intent to cause great bodily harm.

In determining whether the evidence was sufficient to prove the requisite intent, the "jury may consider the manner in which the defendant exerted the force and the nature of the victim's injuries to the extent that it reflects the amount or degree of force necessary to cause the injury." State v. Pierre, 108 Wn. App. 378, 385, 31 P.3d 1207 (2001). While specific intent may not be presumed, the trier of fact may infer it "as a logical probability from all the facts and circumstances." State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). All details of the case may indicate intent, including the manner and act of inflicting the wound, and also the nature of the relationship and any prior threats. State v. Ferreira, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993).

We have previously held that stabbing a person in the chest falls within the "statutory standard of conduct 'likely to produce great bodily harm or death.'" State v. Langford, 67 Wn. App. 572, 587, 837 P.2d 1037 (1992) (quoting RCW 9A.36.011(1)(a)). We have also held that a rational jury could find that the defendant acted with intent to cause great bodily harm when he stabbed several people "in the back, chest or stomach," and one of those people required multiple surgeries to repair the damage. State v. Huddleston, 80 Wn. App. 916, 922, 912 P.2d 1068 (1996).

Likewise here, the evidence is sufficient to permit an inference of the intent to inflict great bodily harm. The State's evidence showed that after yelling racial epithets and accusing Atkins of robbing him, Payne plunged a knife into Atkins' chest with enough force to penetrate the chest cavity, narrowly missing his heart. His conduct was indicative of intent to cause death or serious permanent injury. While the knife missed Atkins' heart, he received prompt treatment, and he apparently did not suffer a permanent impairment, this outcome was not inevitable. Atkins' survival and recovery does not negate Payne's apparent intent.

Payne also challenges the sufficiency of the evidence to support one of the charged alternative means of assault. Specifically, he challenges the sufficiency of the evidence to establish that he inflicted great bodily harm upon Atkins. He argues that the only injury Atkins sustained, a collapsed lung, was treatable and did not create a "probability of death." RCW 9A.04.110(4)(c). He further argues that the injuries the treating physician characterized as potentially fatal or likely to

lead to permanent impairment, were merely injuries Atkins might have suffered had the knife struck Atkins in a slightly different location.

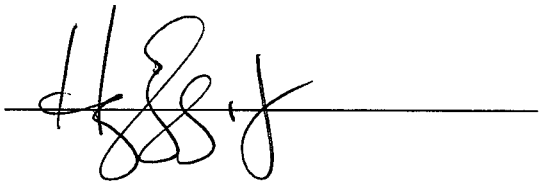
But viewing the evidence in the light most favorable to the State, as we must, we conclude it was sufficient to support the jury's determination that the assault resulted in great bodily harm. The treating physician testified that Atkins suffered a stab wound to the chest that was six centimeters deep, punctured his lung, and placed him at risk for losing a lung. The injury created a significant risk of hemorrhage and "massive" blood loss. The physician explained that a penetrative injury that endangers the heart and/or significant blood vessels is a potentially fatal injury. He also testified that the critical factor in penetrative injuries is the depth of penetration, and in this case, the depth was great enough to cause serious injury. He specifically agreed that a stab wound to the chest area creates a probability of death. The logical inference from all the evidence is that the injury inflicted here, a deep stab wound in the chest cavity, resulted in great bodily harm by creating a probability of death. Payne's challenge to the sufficiency of the evidence fails.

III. Interest on Legal Financial Obligations

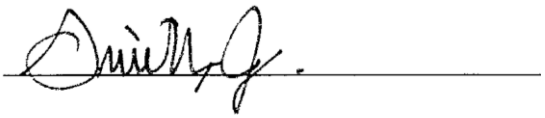
The sentencing court imposed legal financial obligations consisting of a $500 victim penalty assessment and restitution. Under RCW 10.82.090(1), restitution bears interest that accrues from the date of the judgment but, as of June 7, 2018, other legal financial obligations do not accrue interest.

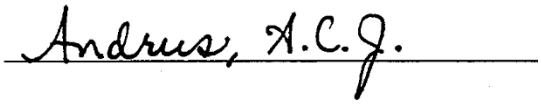
Payne claims that his judgment and sentence requires interest accrual on all legal financial obligations imposed and therefore must be amended. We disagree. Payne's judgment and sentence provides that "[f]inancial legal obligations shall bear interest pursuant to RCW 10.92.090." The court also checked a box that provides, "[i]nterest is waived except with respect to restitution." Reading the language of Payne's judgment and sentence in conjunction with the statute, it is clear that interest will accrue only on the restitution he was ordered to pay.

Affirmed.



WE CONCUR:





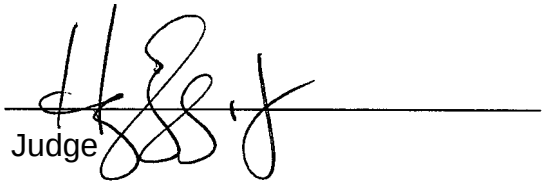
IN THE COURT OF THE APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JOEL EDWARD PAYNE, Appellant.	)	No. 79675-5-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Joel E. Payne, filed a motion for reconsideration of the opinion filed on August 3, 2020. The respondent filed a response to the motion. The majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:



Judge

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. 79675-5-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:

☒ respondent Dennis McCurdy, DPA
[dennis.mccurdy@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit
[PAOAppellateUnitMail@kingcounty.gov]

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: November 12, 2020
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