

NO. 67793-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES MICHAEL DENSMORE,

Appellant.

2019 JUN 05 3:22 PM
COURT OF APPEALS
DIVISION ONE
SEATTLE, WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ISSUES</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 2 |
| 1. PROCEDURAL FACTS | 2 |
| 2. SUBSTANTIVE FACTS | 3 |
| C. <u>ARGUMENT</u> | 9 |
| 1. WAHBI'S INADVERTENT DESTRUCTION OF THE VIDEO DID NOT VIOLATE DENSMORE'S RIGHT TO DUE PROCESS..... | 9 |
| a. Wahbi's Unilateral And Unintentional Destruction Of The Video Cannot Be Imputed To The State | 10 |
| b. Alternatively, The Destruction Of The "Potentially Useful" Video Did Not Violate Due Process Because There Is No Evidence Of Bad Faith | 13 |
| 2. SUFFICIENT EVIDENCE SUPPORTS DENSMORE'S CONVICTIONS | 17 |
| D. <u>CONCLUSION</u> | 22 |

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Brady v. Maryland, 373 U.S. 83,
83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)..... 13

California v. Trombetta, 467 U.S. 479,
104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)..... 14

Washington State:

City of Seattle v. Fetting, 10 Wn. App. 773,
519 P.2d 1002 (1974)..... 12, 15

State v. Agee, 15 Wn. App. 709,
552 P.2d 1084, aff'd on other grounds,
89 Wn.2d 416 (1977)..... 10, 11

State v. Alvarez, 128 Wn.2d 1,
904 P.2d 754 (1995)..... 17

State v. Copeland, 130 Wn.2d 244,
922 P.2d 1304 (2001)..... 12, 17

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107 (2000)..... 18, 21

State v. Gonzales, 24 Wn. App. 437,
604 P.2d 168 (1979)..... 10, 11

State v. Groth, 163 Wn. App. 548,
261 P.3d 183 (2011), review denied,
173 Wn.2d 1026 (2012)..... 12, 14, 17

State v. Hubbard, 103 Wn.2d 570,
693 P.2d 718 (1985)..... 17

State v. Jenkins, 53 Wn. App. 228,
766 P.2d 499 (1989)..... 19

| | |
|---|------------|
| <u>State v. Potts</u> , 93 Wn. App. 82, 969 P.2d 494 (1998)..... | 15 |
| <u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)..... | 17 |
| <u>State v. Sims</u> , 14 Wn. App. 277, 539 P.2d 863 (1975)..... | 18 |
| <u>State v. Smith</u> , 110 Wn.2d 658, 756 P.2d 722 (1988)..... | 10 |
| <u>State v. Swenson</u> , 104 Wn. App. 744, 9 P.3d 933 (2000)..... | 10 |
| <u>State v. Wittenbarger</u> , 124 Wn.2d 467, 880 P.2d 517 (1994)..... | 13, 14, 16 |

Statutes

Washington State:

| | |
|-------------------|----|
| RCW 9.73.110..... | 11 |
|-------------------|----|

Rules and Regulations

Washington State:

| | |
|---------------|----|
| RAP 10.3..... | 17 |
|---------------|----|

A. ISSUES

1. The exclusionary rule prevents the State from using evidence illegally obtained by a private citizen at the State's direction. Here, a victim lawfully videotaped a burglary that occurred at his business. Did the trial court properly suppress evidence of the lawfully recorded video?

2. Due process requires that the prosecution disclose and preserve material exculpatory evidence. If the evidence is only "potentially useful" to the defense, then the failure to preserve the evidence does not violate due process unless the police acted in bad faith. In this case, police told a burglary victim to save the video that he had recorded of the incident. The victim inadvertently destroyed the video while trying to copy it from his hard drive. Given these circumstances, has Densmore failed to show that the video was materially exculpatory, and if so, that the police acted in bad faith?

3. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. At trial, the State presented evidence that a witness identified Densmore, and his two housemates, as

having acted suspiciously at a business the night before it was burglarized. Densmore owned a car that closely matched the witnesses' description of the car associated with the suspects, and had multiple burglary tools in his car and home that matched the type of tools used to commit the crimes charged. Is this sufficient evidence to demonstrate that Densmore committed the crimes?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged James Michael Densmore with Burglary in the Second Degree, Theft in the First Degree, and Malicious Mischief in the First Degree. CP 9-11. Although Densmore's first trial ended in a hung jury, Densmore's second trial resulted in a conviction on all of the crimes charged. CP 121-23; 2RP 354-55; 4RP 3.¹ The trial court imposed an exceptional sentence of 94 months,² based on Densmore's offender score of 33 and its finding that the theft and malicious mischief convictions would otherwise go unpunished. CP 159-66, 184-86; 5RP 635-36.

¹ The Verbatim Report of Proceedings consists of five volumes designated as follows: 1RP (4/5/11, 4/6/11, 5/9/11, 5/10/11, and 5/11/11), 2RP (5/11/11, 5/12/11, 5/13/11, 6/2/11, 6/6/11, and 6/7/11), 3RP (6/7/11, 6/9/11, 7/6/11), 4RP (6/9/11), and 5RP (7/6/11 and 8/4/11).

² The court imposed 51 months for the burglary, to run consecutive to the 43 months imposed on each of the other two convictions. CP 159-66, 184-86; 5RP 635-36.

2. SUBSTANTIVE FACTS

On February 7, 2009, three white men walked into the Celtic Bayou pub in Redmond, Washington. 3RP 417, 495-96. The men's "really different" demeanor and "suspicious" behavior caught the attention of the pub's owner, Benaissa Wahbi, and two other employees, Bryce Bentler and Jessica Harmston. 3RP 417-18, 475, 495. Wahbi noticed that the men walked slowly into the pub while looking at the ceiling. 3RP 417. The men fanned out in separate directions, one heading to the bathroom, another taking a seat at the bar, and the third walking around the bar, before rejoining for a seat together at the bar. 3RP 417-18. Although Wahbi knew almost everyone who frequented the "neighborhood" pub, he had never seen these men before. 2RP 397; 3RP 418.

Harmston, a server at the pub, thought it was "really weird" that the men sat quietly at the bar without making much effort to "catch up and talk" to each other. 3RP 474-75. Bentler, the bartender, thought the men had a "strange vibe," but could not explain what made him think that they looked "kind of shady." 3RP 495. Bentler asked two of the men for identification, and learned that one man was born in 1986 and the other in 1966. 3RP 496. Bentler overheard one of the two older men refer to himself as the

father of the third, younger man in the group. Id. The men arrived around 9 p.m. and stayed for no more than one hour. Id.

Around 10:45 or 11 p.m., Bentler saw the men sitting outside the pub smoking cigarettes in a four-door sedan. 3RP 497. The men were parked outside a nearby donut shop that was closed. 3RP 477, 498. A few minutes later, Harmston left the pub and saw the three men sitting in a dark blue, four-door sedan from the 1990s. 3RP 475-76. The men made Harmston feel "really uncomfortable" when they "stared" her down as she walked to her car. 3RP 478.

The next morning, Bentler arrived around 10:30 a.m. to open the business. 3RP 494. Bentler noticed that the lock was "busted" on the office door and that the safe had been moved from its normal place in the liquor room to the office floor. Id. The safe was pried open and missing nearly \$5,000 in cash. 3RP 411-12, 494. The door to the liquor room had also been forced open and appeared to have "pry marks" on the lock. 3RP 411, 537. The "little cabinets" where the servers kept their money were "all smashed up," and the office was missing "money bags" from the night before. 2RP 400. Bentler called Wahbi and the police shortly thereafter. 3RP 494.

Redmond Police Officer Jeremy Sandin responded to the pub. 3RP 535. Sandin observed the damage inside the business and noticed that the door to a small electrical room adjoining the pub had also been pried open. 3RP 538. Inside the electrical room, someone had cut a hole three feet in diameter in the drywall connecting the pub's bathroom and outdoor electrical room. 3RP 538-39. Sandin estimated the total damage to the pub to be approximately \$1,600.00.³ 3RP 539.

Wahbi showed Sandin surveillance video from the burglary that he located on his computer hard drive. 3RP 423, 542. Sandin told Wahbi to save the video because Wahbi could not remember how to copy it from his hard drive. 3RP 544-45. Wahbi's surveillance system had been in place for three to four months prior to the burglary, and he had never made a copy from it. 2RP 398. Although Wahbi later tried to copy the video, he was unsuccessful and damaged his hard drive in the process. 3RP 423. Later efforts by police to recover the video from Wahbi's damaged hard drive were similarly unsuccessful. 3RP 441-43.

Nonetheless, both Wahbi and Sandin remembered what they had seen on the video because they both watched it several

³ Wahbi testified that he spent nearly \$5,000.00 to repair the damage. 3RP 424.

times on the morning after the burglary. 3RP 418, 543. Wahbi testified that he saw three white men enter the office, break into the "little cabinets" with a crowbar, and grab the money bags. 3RP 413-16. Wahbi recognized the three suspects as the same men he had seen in the pub the night before based on their similar shape, build, and height. 3RP 419. Wahbi specifically recognized one of the men's faces, and was "very certain" that two of the men were the same, and "90%" sure that the third man was the same. 3RP 419-21. Bentler watched the video at least once and also recognized one or two of the men from the night before. 3RP 494-95.

Sandin testified that he remembered the video showing that three white men entered the office at 4:41 a.m. on February 8, 2009. 3RP 542-44. All three men were wearing gloves and either black or light-colored hooded sweatshirts. Id. Within 80 seconds of entering the office, one of the suspects caught sight of the video camera and turned it away. 3RP 543. Sandin was unable to collect any fingerprints from the burglary. 3RP 540-41.

In late March 2009, police determined that Densmore and two of his housemates, Byron and Tyler Bowman, might have committed the crime. 3RP 446, 507. Byron and Tyler Bowman are

father and son, respectively. 3RP 448. On April 1, 2009, police separately showed Wahbi and Bentler three photo montages, each containing one of the suspects' pictures. 3RP 464-67. Although Wahbi could not identify any of the suspects with certainty, Bentler identified all three suspects.⁴ 3RP 471-73, 488-500. Bentler was "very confident" in his identification of Tyler Bowman, "somewhat confident" in his identification of Byron Bowman, and "least confident" in his identification of Densmore. 3RP 499-500. Bentler could not identify Densmore at trial. 3RP 489.

Following the montages, police executed a search warrant at Densmore's home. 3RP 507. During the search, police found a jacket, hooded sweatshirt, four pry bars, and a sledge hammer, all covered with a white, powdery substance consistent with drywall. 3RP 511-19. Most of the items were located in Densmore's garage, although police also found three different screwdrivers and a visor light in Densmore's bedroom. 3RP 516-17, 523. Police found two pairs of gloves and a box cutter in the trunk of Densmore's 1993 black, four-door sedan. 3RP 509, 516, 527.

⁴ Wahbi could not identify either Densmore or the Bowmans in the montages. Wahbi did, however, identify the same person twice. 3RP 422-23, 469-70. The person was not a suspect, but appeared in two of the montages due to a shortage of photos of similar-looking suspects. 3RP 449, 458.

Police also located two "go" or "ready" bags in Densmore's home, each containing a pair of gloves, a pry bar covered with a white, powdery substance on one end, and a screwdriver. 3RP 518-19.

At trial, a detective with training and experience investigating burglaries testified that burglars commonly use pry bars to break through drywall and force open doors, screwdrivers to manipulate door locks, gloves to avoid leaving fingerprints, and visor lights to illuminate what they are doing while keeping their hands free. 3RP 506, 516, 519-20. The detective noted that Densmore did not have other tools in the "go" bags that were associated with construction or drywall work, such as a tape measure, framing hammer, "T-square," trowel, putty knife, or drywall tape. 3RP 520-21.

Prior to trial, Densmore moved to dismiss the charges against him based on the police's failure to preserve the video of the burglary. CP 187-81; 1RP 16-23. Alternatively, Densmore moved to suppress any reference to the destroyed video. CP 191-92; 1RP 26-30. Both parties agreed on the facts surrounding the video's destruction and presented only legal argument. CP 74.

The court denied the motion to dismiss because the police were "not involved" in the unsuccessful efforts to copy the video

that led to its destruction. CP 74; 1RP 25. The court found that the police had no obligation to seize Wahbi's hard drive because it would likely have disrupted his business, and the police had no reason to believe that the video would be destroyed. CP 74; 1RP 25. The court similarly denied the motion to suppress because there was no evidence that the video was destroyed in bad faith. CP 74; 1RP 35-36.

C. ARGUMENT

1. WAHBI'S INADVERTENT DESTRUCTION OF THE VIDEO DID NOT VIOLATE DENSMORE'S RIGHT TO DUE PROCESS.

Densmore argues that the trial court erred by denying his motion to dismiss and motion to suppress based on the destroyed video. He contends that the police, and thereby the prosecution, are responsible for the video's destruction because Sandin directed Wahbi to copy the video, rather than seizing Wahbi's hard drive.

Densmore's claim fails. Densmore fails to provide any authority to support his claim that the State is liable for a private citizen's unilateral and unintentional destruction of evidence. Even if the police were negligent for directing Wahbi to copy the video and failing to seize the hard drive, Densmore cannot show that the video was material exculpatory evidence. At best, the video was

only "potentially useful" to the defense. Densmore cannot show that the video's destruction violated his right to due process because there is no evidence that the police acted in bad faith.

a. Wahbi's Unilateral And Unintentional Destruction Of The Video Cannot Be Imputed To The State.

The exclusionary rule cannot be used to suppress evidence illegally obtained by a private individual unless the individual was acting at the State's direction. State v. Smith, 110 Wn.2d 658, 666, 756 P.2d 722 (1988); State v. Swenson, 104 Wn. App. 744, 753, 9 P.3d 933 (2000). The defendant bears the burden of proving that the private individual acted as an instrumentality or agent of the State. Id. at 754.

Densmore argues that Wahbi became an agent of the State when Sandin directed him to copy the video, relying on State v. Agee, 15 Wn. App. 709, 552 P.2d 1084, aff'd on other grounds, 89 Wn.2d 416 (1977), and State v. Gonzales, 24 Wn. App. 437, 604 P.2d 168 (1979). Densmore mistakenly relies on these cases to support his claim that Wahbi's destruction of the video can be imputed to the State.

Agee and Gonzales are consistent with, and cited by, the cases discussed above. Smith, 110 Wn.2d at 666; Swenson, 104

Wn. App. at 755. Both Agee and Gonzales stand for the general proposition that the State cannot rely on evidence or information that was illegally obtained by a private citizen at the State's direction. See Agee, 15 Wn. App. at 713-14 ("to impute the *illegality of the private citizen* to the State, the latter must have in some way instigated, encouraged, counseled, directed, or controlled that conduct") (emphasis added); Gonzales, 24 Wn. App. at 440 ("There is no prohibition against the State's use of evidence or information obtained by a private citizen, even though by *unlawful means*, unless the actions of the private citizen were in some way 'instigated, encouraged, counseled, directed, or controlled' by the State or its officers.") (emphasis added).

Densmore does not argue, nor could he argue, that Wahbi illegally obtained the video of the burglary. See RCW 9.73.110 (declaring a building owner can lawfully record a person's communications and conversations occurring inside the building if the person is engaged in criminal activity "by virtue of unlawful entry or remaining unlawfully"). Agee and Gonzales are inapposite here where there is no evidence that Wahbi used illegal means to obtain the video.

Densmore does not cite any authority to support his claim that "Officer Sandin made Wahbi an agent of the State by directing him to attempt to make a copy of the video rather than taking the hard drive with him to preserve the evidence." Br. of App. at 15-16. Densmore fails to explain how "the destruction of the video can be imputed to the State," when Wahbi unilaterally and unintentionally destroyed the video. Id. at 16. Densmore does not dispute that Sandin told Wahbi to preserve the video, nor does he dispute that Wahbi destroyed the video inadvertently on his own.

Moreover, Densmore makes no effort to reconcile the facts of this case with the number of other destruction of evidence cases where the police undeniably directed and carried out the destruction of evidence. See, e.g., State v. Copeland, 130 Wn.2d 244, 279, 922 P.2d 1304 (2001) (federal agent discarded remaining DNA extracted from the crime scene); State v. Groth, 163 Wn. App. 548, 554, 261 P.3d 183 (2011) (police sergeant ordered the destruction of almost all physical evidence of a cold case homicide), review denied, 173 Wn.2d 1026 (2012); City of Seattle v. Fettig, 10 Wn. App. 773, 775-76, 519 P.2d 1002 (1974) (police negligently destroyed video of defendant performing sobriety tests).

Contrary to the officers in those cases, Sandin did not destroy the video, and in fact, told Wahbi to preserve it. 3RP 544-45.

Given the evidence and the case law, Densmore cannot show that Wahbi's unilateral and unintentional destruction of the video can be imputed to the State. Having failed to show that the State is responsible for the video's destruction, Densmore cannot claim that the State violated his right to due process by destroying or failing to preserve the video. Thus, this Court need not consider Densmore's claim that the destroyed video amounted to material exculpatory evidence.

b. Alternatively, The Destruction Of The "Potentially Useful" Video Did Not Violate Due Process Because There Is No Evidence Of Bad Faith.

Due process requires that the prosecution disclose and preserve material exculpatory evidence under both the state and federal constitutions. State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). If the State fails to preserve material exculpatory evidence, then criminal charges must be dismissed. Wittenbarger, 124 Wn.2d at 475. "A showing that the evidence *might* have exonerated the defendant is not enough."

Id. (emphasis added). To qualify as material exculpatory evidence, the evidence must (1) "possess an exculpatory value that was apparent before it was destroyed," and (2) "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id.

If the evidence does not meet this two-prong test and is only "potentially useful" to the defense, then the State's failure to preserve the evidence does not violate due process unless the defendant can show bad faith on the part of the police. Id. at 477. The presence or absence of bad faith turns on the police's knowledge of the exculpatory value of the evidence at the time it was destroyed. Groth, 163 Wn. App. at 558-59. Bad faith exists if the defendant can show that the destruction of the evidence was "improperly motivated." Id. (quoting Wittenbarger, 124 Wn.2d at 478); see also California v. Trombetta, 467 U.S. 479, 488, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (defendant failed to prove bad faith where the record contained no evidence that officials harbored animus toward the defendants or made a calculated effort to suppress exculpatory evidence).

Even if Wahbi's destruction of the video can be imputed to the State, Densmore cannot show that the video amounted to

material exculpatory evidence. Densmore's claim that the video was material and exculpatory rests on pure speculation. Unlike the case on which he relies, City of Seattle v. Fettig, 10 Wn. App. 773, 519 P.2d 1002 (1974), there is no evidence that the video was exculpatory. In Fettig, the municipal court judge saw the video that was later negligently destroyed, and testified that it negated an impression of intoxication. 10 Wn. App. at 774-76. Thus, the defendant in Fettig was able to prove that the tape had exculpatory value.

In contrast to Fettig, Densmore has not made any showing that the video was exculpatory. Densmore can only speculate about what the video showed, and cannot overcome the fact that the video "could have as easily been inculpatory as exculpatory." State v. Potts, 93 Wn. App. 82, 89, 969 P.2d 494 (1998).

Densmore cannot establish a "reasonable possibility" that the video would have been favorable to him if it had been preserved. See Fettig, 10 Wn. App. at 776.

Moreover, Densmore was able to obtain comparable evidence by reasonably available means. All three witnesses who viewed the video several times, Wahbi, Sandin, and Bentler, testified at trial and were available for cross examination.

Densmore's counsel extensively cross-examined the witnesses who viewed the video the most, Wahbi and Sandin, about its contents and their ability to view and identify the suspects. See 3RP 427-29, 433-34, 546-48, 550. Densmore has failed to show either that the video possessed an exculpatory value, or that he was unable to obtain comparable evidence by other reasonably available means.

At best, the video was only "potentially useful" to Densmore. Wittenbarger, 124 Wn.2d at 477. Thus, Densmore cannot prevail on his due process claim unless he can show that the police acted in bad faith in destroying, or failing to preserve, the "potentially useful" video. Id.

Given the undisputed record, Densmore cannot establish that the police acted in bad faith. Densmore does not assign error to any of the court's findings, including that there was "no evidence that the video was destroyed in bad faith," that the police were "not involved" in the unsuccessful efforts to copy the video, that the police had "no reason to believe that the video would not be successfully copied," and that seizing Wahbi's hard drive "would likely have disrupted the business." CP 74. Densmore's failure to assign error to the court's findings means that the issue of bad faith

need not even be considered. Copeland, 130 Wn.2d at 280; RAP 10.3(a)(4); State v. Hubbard, 103 Wn.2d 570, 574, 693 P.2d 718 (1985). Nevertheless, Densmore does not even attempt to argue that the police acted in bad faith, or that their actions were "improperly motivated." Groth, 163 Wn. App. at 559. Having failed to demonstrate bad faith on the part of the police, Densmore cannot show that a due process violation occurred.

2. SUFFICIENT EVIDENCE SUPPORTS DENSMORE'S CONVICTIONS.

Densmore argues that the State failed to prove beyond a reasonable doubt that he committed the crimes at the Celtic Bayou. Viewing the evidence in the light most favorable to the State, Densmore's argument fails. The State produced sufficient evidence that Densmore burglarized, damaged, and stole from the pub.

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of

the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Densmore challenges the sufficiency of the State's evidence solely on the element of identity. Although the sufficiency of the evidence standard requires the appellate court to defer to the trier of fact on issues of witness credibility and persuasiveness of the evidence, Densmore asks this Court to second-guess the jury's credibility determination. Densmore fails to cite a single case where the reviewing court reversed a defendant's burglary conviction based on insufficient evidence of identity. Indeed, reviewing courts are generally unwilling to disturb a jury's credibility determination regarding identity on appeal. See State v. Sims, 14 Wn. App. 277, 282, 539 P.2d 863 (1975) (denying defendant's

sufficiency challenge to burglary conviction based on inconsistent identification testimony); State v. Jenkins, 53 Wn. App. 228, 238, 766 P.2d 499 (1989) (same).

Viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could find that Densmore, along with his two housemates, the Bowmans, broke into the pub and took the money inside. Both Wahbi and Bentler recognized the men in the burglary video as the same men that they had seen the night before at the pub acting suspiciously. 3RP 417-19, 494-95. Wahbi, who watched the video several times, was "very certain" that two of the men were the same and "90%" sure that the third man was the same. 3RP 419-21. Wahbi recognized the men based on their similar shape, build, and height. 3RP 419. Bentler, who watched the video at least once, recognized "one or two" of the men from the night before. 3RP 494-95.

Although Bentler did not recognize all three men from the night before, he remembered that two of the men were father and son and that one man was born in 1966, while the other was born in 1986. 3RP 496. Bentler identified the Bowmans, who were father and son, and born in 1964 and 1987, respectively, in photo

montages two months after the incident, as the men that he had seen at the pub on the night of the burglary. 3RP 447-48. Bentler was "very confident" in his identification of Tyler Bowman, and "somewhat confident" in his identification of his father, Byron Bowman. 3RP 499-500. While Bentler was "least confident" in his identification of Densmore, he still chose Densmore despite having been told that he did not have to make a selection. 3RP 499-500.

A rational trier of fact could have reasonably inferred that Densmore was the third man who committed the crimes based on the fact that the Bowmans lived at Densmore's house, and the fact that Densmore owned a 1993, black, four-door sedan which closely matched Bentler's and Harmston's description of the vehicle involved as a "dark blue," "90's" four-door sedan. 3RP 476, 497, 507, 509.

Moreover, the four pry bars, sledge hammer, and clothing located at Densmore's home, all covered in apparent drywall dust, also corroborated Densmore's involvement in the crimes. 3RP 511-19. Other burglary tools found during the search, including the three different types of screwdrivers and visor light in Densmore's bedroom, two pairs of gloves and the box cutter in Densmore's trunk, and two "go" or "ready" bags with pry bars, gloves, and a

screwdriver, but no other construction-related tools, further confirmed Densmore's involvement. 3RP 511-19. Given this evidence and the detective's testimony about how such tools are used to commit burglaries, a rational trier of fact could have reasonably concluded that Densmore and the Bowmans used the pry bars found in the home to break through the drywall to unlawfully enter the pub and pry open the safe, the screwdrivers to manipulate the door locks, and the gloves to avoid leaving fingerprints. 3RP 506, 516, 519-20.

Densmore's post-conviction efforts to discredit the witnesses' credibility are misplaced. On appeal, a reviewing court must defer to the trier of fact on issues of witness credibility, conflicting testimony, and the persuasiveness of the evidence. Fiser, 99 Wn. App. at 719. Admitting the truth of the witnesses' testimony and drawing all reasonable inferences in favor of the State, there is sufficient evidence from which a rational trier of fact could find that Densmore committed the crimes.

D. CONCLUSION

For the reasons stated above, the Court should affirm
Densmore's convictions.

DATED this 5th day of June, 2012.

Respectfully submitted,

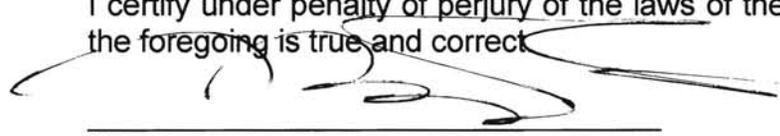
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Rebecca Wold Bouchey, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JAMES DENSMORE, Cause No. 67793-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

Date 06/05/12