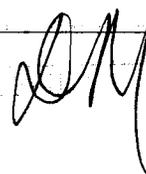


NO. 41432-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**



STATE OF WASHINGTON, RESPONDENT

v.

JASON TIMOTHY WEISS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan, Judge

No. 10-1-00362-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State adduce sufficient evidence to support the jury's finding of guilt on assault in the second degree when it showed defendant intentionally pulled a police officer alongside an accelerating vehicle as he fled from lawful arrest?

B. ISSUES PERTAINING TO DEFENDANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

1. Has defendant failed to show the trial court erred in refusing to instruct the jury on self-defense when there was no evidence defendant actually faced imminent danger of serious injury or death when he assaulted two uniformed officers to avoid lawful arrest?
2. Did defendant fail to show the trial court erred in denying his motion to dismiss for failure to preserve exculpatory evidence when it found the car used in the incident was not exculpatory and defendant made no effort to examine it before it was sold at public auction?

C. STATEMENT OF THE CASE.

1. Procedure

On January 25, 2010, the Pierce County Prosecutor's Office filed an information in Pierce County Cause No. 10-1-00362-4, charging the appellant JASON TIMOTHY WEISS ("defendant"), with assault in the first degree (victim—Officer Dean Waubanascum), assault in the third degree (victim—Officer Eric Barry), attempting to elude a pursuing police vehicle, reckless endangerment, and driving while in suspended or revoked status in the second degree. CP 1-3. The information was later amended to remove the count of driving while in suspended or revoked status in the second degree. CP 9-11.

The Honorable Vicki L. Hogan presided over the trial. RP 114. After hearing the evidence, the jury found the defendant guilty of the lesser included offense of assault in the second degree for assaulting Officer Waubanascum with a deadly weapon. CP155. The jury also found the defendant guilty of assault in the third degree, attempting to elude a pursuing police vehicle, and reckless endangerment. CP 157-159.

The court imposed an exceptional sentence of sixty months relying on the jury's special verdict that the defendant assaulted Officer Waubanascum in the course of Officer Waubanascum's official police duties. CP 256-260. Defendant also received a concurrent twelve month

sentence for the crimes of assault in the third degree and attempting to elude a pursuing police vehicle. CP 256-260.

Defendant filed a timely notice of appeal from the entry of his judgment. CP 164.

2. Facts

At approximately 0100 hours on January 23, 2010, Officer Dean Waubanasum and Officer Eric Barry were working as a uniform patrol in a marked police car when they observed defendant leave the 7-Eleven parking lot at a high rate of speed. RP 141-143, 147, 188-189, 209. After pacing defendant's car at 48 mph in a 30 mph zone, the officers initiated a traffic stop. RP 189, 191. Officer Barry walked to the defendant's driver-side door as Officer Waubanasum positioned himself on the car's passenger side. RP 191. Once there, Officer Waubanasum observed defendant's three year old son sleeping in the front-passenger seat. RP 192, 237.

Officer Barry contacted defendant from just outside the driver-side door, requested defendant's license and told defendant why he was being detained. RP 192. Standing outside the open driver-side window Officer Barry detected an odor of intoxicants. RP 146.

Unable to produce a driver's license, defendant handed Officer Barry his identification card, admitting that his driving privileges had been suspended. RP 193. Defendant then shut off his car, but was unwilling to exit the car as directed. RP146, 193. When Officer Barry repeated the

instruction, defendant became increasingly agitated and shouted: “no, no, I am not getting out.” RP 194. Officer Barry then reached through the car’s open window to unlock the driver-side door, but defendant appeared to relock it. RP 194. When Officer Barry told the defendant he was under arrest, defendant restarted his car. RP 146. Defendant then grabbed Officer Barry as Officer Barry reached into the car to secure the keys. RP 146. A physical struggle ensued. RP 146. During the struggle both officers repeatedly directed defendant to surrender his keys and get out of the vehicle, but defendant did not comply. RP 148, 150.

Officer Waubanascum moved to the driver-side window to gain control of defendant. RP 148. When Officer Waubanascum reached in the car and placed both of his hands around the arm defendant was using to grab Officer Barry, defendant released his hold on Officer Barry, pulled his fist in towards his chest causing his elbow to clinch down upon Officer Waubanascum’s hands, and turned his upper body toward the car’s passenger side. RP 195-197, 199. Defendant’s maneuver pulled Officer Waubanascum’s upper body inside the driver-side window and forced Officer Waubanascum’s elbow against the driver-side headrest. RP 195-197, 199. Defendant then screamed: “no, no” and revved the car’s engine. RP 200. Officer Waubanascum watched the vehicle’s dashboard-RPM gauge redline just before defendant drove forward with Officer Waubanascum’s lower body bent over the outside of the driver-side window. RP 200-202.

Unable to free his hands, Officer Waubanasum repeatedly directed defendant to “stop, stop the car, let me go,” but defendant did not comply; instead, defendant maintained his hold on Officer Waubanasum’s hands as he drove the car forward with increasing speed. RP 201. Officer Waubanasum feared he was going to be pulled underneath defendant’s car and killed. RP 202, 204-206. Officer Waubanasum then cleared his feet off the ground by pulling his knees into his chest when he could no longer keep pace with the car. RP 202, 204-206. Officer Waubanasum was carried at increasing speeds for a distance of 30 to 40 feet before he was finally able to free his hands. RP 152, 202. When Officer Waubanasum broke free he was traveling at a speed that forced him to continue running down the road in an effort to keep his upper body from overtaking his feet. RP 206-207. Officer Waubanasum came to a stop in the road and noticed a friction burn on his elbow where it had been forced into contact with the interior of defendant’s car. RP 207-208.

Officer Waubanasum made his way back to Officer Barry. RP 208-209. Both officers watched defendant take off west of their position at a high rate of speed. RP 208-209. “Totally blacked out” (without headlights), defendant passed several marked police cars at speeds ranging from 80 mph to 100 mph. RP 208, 215. Despite the presence of other cars and pedestrians, defendant ran a red light at 84th and Hosmer. RP 216.

Trooper Wickman joined the pursuit when defendant traveled over I-5 on 84th Street; he followed defendant through the city streets until defendant rendered his car inoperable by traveling along a set of rail-road tracks. RP 414, 426-427.

Unable to drive, defendant got out of his car, picked up his son, and took off on foot. RP 192, 431-432. Moments later, defendant lost his grip causing the child to fall to the ground; rather than picking the child up, defendant dragged him along the ground to a seven foot cyclone fence topped with a crisscross pattern of metal spikes and threw him over. RP 432-433, 438. After climbing over the fence, defendant continued to drag the child along the ground, this time, toward a nearby warehouse. RP 432.

When Trooper Wickman followed defendant over the fence, his hand and trousers were torn along the fence top. RP 433, 438. By the time Trooper Wickman made it to the warehouse defendant had been taken into custody by other officers; defendant continued to resist while screaming profanities as he lay handcuffed on the ground. RP 226, 434.

Following defendant's arrest, Officer Waubanasum advised defendant of his *Miranda* rights. RP 227. When Officer Waubanasum asked defendant why he fled, defendant stated: "I just didn't want to go back to jail." RP 227.

Defendant represented himself at trial with the assistance of stand-by counsel, but elected not to testify. RP 45, 456-457. Defendant called one witness to describe the car he used in the incident. RP 450-455.

D. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING OF GUILT ON ASSAULT IN THE SECOND DEGREE WHEN IT SHOWED DEFENDANT INTENTIONALLY PULLED A POLICE OFFICER ALONGSIDE AN ACCELERATING VEHICLE AS HE FLED FROM LAWFUL ARREST.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said: “great deference ... is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

The same standards used to test sufficiency of the evidence for a finding of guilt on a substantive crime are employed when testing the sufficiency of the evidence supporting an aggravating factor. *See generally State v. Suleiman*, 158 Wn.2d 280, 291, n. 3, 143 P.3d 795 (2006).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

a. The State Produced Sufficient Evidence to Prove Defendant Assaulted Officer Waubanascum with His Vehicle.

In the instant case, the jury was instructed that to convict of assault in the second degree it had to find the following elements:

- “(1) That on or about January 23, 2010, the defendant assaulted
Dean Waubanascum with a deadly weapon;
(2) That this act occurred in the State of Washington.”

CP 136 Instruction No. 16. The jury was further instructed on the three definitions of assault: (1) an intentional touching or striking that is harmful or offensive regardless of whether any physical injury is done to the person; (2) an act done with the intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented; and (3) an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. CP 126 Instruction No. 7. The instructions defined a deadly weapon as “any weapon, device, instrument, substance, or article including a vehicle, which under the circumstances in which it is used, attempted to be used, or threatened to

be used, is readily capable of causing death or substantial bodily injury.”

CP 130 Instruction No. 12.

“To prove an assault based solely on an attempt to injure, the State must show that the defendant specifically intended to cause bodily injury.” *State v. Barker*, 136 Wn. App. 878, 883, 151 P.3d 237 (2007) citing *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996).

“But the State need not prove specific intent—either to inflict substantial bodily harm or to cause apprehension—if unlawful physical contact occurs. That is an actual battery. *Barker*, at 884. “Moreover, the State [need only] show that the physical act constituting the assault was intentional, not the infliction of injury or apprehension.” *Id.* at 884.

In *State v. Johnston*, Johnston was charged with assault in the third degree for driving a getaway car in a manner that assaulted a loss prevention officer attempting to interrupt a shoplift. The officer approached Johnston yelling “Security stop,” before she grabbed Johnston’s hair through the open driver-side window. 85 Wn. App. 549, 553, 933 P.2d 448 (1997). To escape, Johnston stepped on the gas causing the car to speed forward. *Id.* at 553. The car’s forward motion caused the officer to fall to the ground. *Id.* at 553.

On appeal, Johnston argued that the State failed to prove she assaulted the officer because there was no evidence of intentional or harmful touching. *Id.* at 554. Johnston asserted that the officer’s injuries resulted from her falling off the car as it drove, not from any force the defendant put in motion. *Id.* at 554. Finding Johnston’s argument “flawed,” the Court of Appeals held that “[t]he evidence [wa]s sufficient to show Ms. Johnston committed an assault by battery through use of an indirect force or force applied through an intervening agency—her car.” *Id.* 554. The Court of Appeals went on to find that “[t]he jury could reasonably infer from the evidence that Ms. Johnston intentionally touched or struck [the officer’s] arm with the car frame upon acceleration (because the arm extended into the car through the open window, the car could not move forward without striking it).” *Id.* at 555. The Court of Appeals deemed it equally reasonable for the jury to “infer that Ms. Johnston intentionally removed the car, which [the officer] was leaning against, and thereby caused [the officer] to fall to the ground. In either instance, the jury could reasonably infer that contact with the car frame or the ground, was harmful or offensive.” *Id.* at 555. *See also State v. Hoeldt*, 139 Wn. App. 225, 226, 228, 230, 160 P.3d55 (2007) (Hoeldt appealed his conviction for second degree assault with a deadly weapon based on his pit bull’s attack on a police officer. After holding that the

dog, as used, fit the statutory definition of a deadly weapon, the Court of Appeals found that the evidence established that Hoeldt used his pit bull as a deadly weapon when he intentionally released the dog upon a police officer.).

In the instant case, defendant intentionally maintained his hold on Officer Waubanascum's hands as he intentionally accelerated his car down the road. Defendant ignored Officer Waubanascum's repeated requests to be released and forced Officer Waubanascum's elbow into the driver-side headrest. As a consequence of defendant's combined acts, Officer Waubanascum's lower body was carried outside a moving car for an estimated distance of thirty to forty feet.

The facts at bar are more compelling than the facts upheld in *Johnston*. Here, defendant ignored Officer Waubanascum's repeated requests to be released when he stepped on the gas knowing that he had a hold on Officer Waubanascum's hands; it was defendant, not Officer Waubanascum, who controlled the physical encounter between them. In contrast, Johnston stepped on the gas with mere knowledge that the officer had hold on her. In both cases, the defendant-drivers applied indirect force upon the victim-officers by stepping on the gas knowing that act would bring the victim-officers into physical contact with a moving vehicle.

Nevertheless, defendant challenges the sufficiency of the evidence to support his conviction for second degree assault arguing that the State failed to prove he used the car to assault Officer Waubanasum. Here, defendant claims that, at best, he merely touched Officer Waubanasum with his arm.

Defendant's argument overlooks the fact that by trapping Officer Waubanasum's hands within his own arm, and stepping on the gas, he forced Officer Waubanasum's elbow into contact with the driver-side headrest and created a substantial risk that the lower part of Officer Waubanasum's body would come in harmful contact with the car or pavement. When defendant combined these acts with the hold he maintained on Officer Waubanasum's hands, defendant caused Officer Waubanasum to be carried thirty to forty feet down the road at ever increasing speeds.

By suggesting that his physical hold on Officer Waubanasum's hands should be considered in isolation—divorced from the indirect force he simultaneously brought to bear through the agency of his vehicle—defendant must be arguing that the three definitions of assault do not contemplate criminal liability when one intentionally combines the direct force of one's body with the indirect force of a dangerous instrument in a manner that unlawfully brings both to bear upon another. The fact that

Hoeldt did not need to manually strike the officer with his vicious dog, and Johnston did not need to drive her car over the officer's leg, for both to be guilty of assaults, clearly establishes the error in defendant's reasoning.

Defendant's conviction for second degree assault with a deadly weapon should be affirmed.

b. The State Produced Sufficient Evidence to Prove Defendant Intended to Assault Officer Waubanasum.

In the instant case, the jury was instructed that “[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 105 Instruction No. 9.

Intent is not synonymous with motive. *State v. Yarbrough*, 151 Wn. App. 66, 84, 210 P.3d 1029 (2009). “Intent is the mental state with which the criminal act is committed ... motive is an inducement which tempts a mind to commit a crime.” *Id.* at 84.

In *Barker*, Barker attempted to elude pursuing police vehicles by accelerating his car toward an officer seated on a motorcycle. 136 Wn. App. at 882. The officer jumped off his motorcycle before Barker's car struck it despite Barker's last second effort to veer away. *Id.* 882. At the trial, the judge found that Barker intentionally assaulted the motorcycle

officer with a deadly weapon—his vehicle—and concluded that the crime was second degree assault. *Id.* 882.

Barker appealed his conviction arguing that the trial court drew the wrong factual inference from the evidence. *Id.* at 882. Interpreting Barker’s challenge as an attempt to urge the Court of Appeals to second guess the trial court’s factual inference that Barker intended to escape rather than assault the officer, the Court of Appeals observed that “the logical inferences drawn from the facts of any case are a matter for the finder of fact.” *Id.* at 882.

Reviewing the evidence for factual sufficiency, the Court of Appeals found that Barker saw uniformed police officers with clearly marked police vehicles before he struck. *Id.* at 883. The Court of Appeals affirmed the defendant’s second degree assault conviction holding that the facts easily supported a factual inference that Barker intended to assault the officer. *Id.* at 883. *See also State v. Bencivenga*, 137 Wn.2d 703, 709-710, 974 P.2d 832 (1999)(“Just because there are hypothetically rational alternative conclusions to be drawn from proven facts, the fact finder is not lawfully barred against discarding one possible inference when it concludes such inference unreasonable under the circumstances. Nothing forbids a jury, or a judge, from logically

inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt.”).

In the instant case, the jury was presented ample evidence of defendant’s intent. In an effort to prevent his lawful arrest following a lawful traffic stop initiated by two uniform police officers, defendant released his grasp on the officer trying to secure his car keys, clinched his arm around the hands of the officer trying to restrain him, and drove his car down the road for thirty to forty feet with a police officer’s lower body hanging outside the driver-side window. The jury was also presented evidence that defendant continued to accelerate, reaching an estimated speed of 20 mph, as that trapped officer repeatedly directed defendant to stop the car and release him. Here, a reasonable jury could reasonably infer that defendant intentionally trapped Officer Waubanascum’s hands within his arm before stepping on the gas, and intentionally caused Officer Waubanascum to be carried outside the moving car, since he continued to accelerate his car and hold onto Officer Waubanascum’s hands in spite of Officer Waubanascum’s repeated requests that defendant stop the car and release him.

Identical to Barker, defendant now argues that because he fled to avoid arrest, the evidence cannot also support a reasonable inference that defendant intentionally assaulted Officer Waubanascum along the way.

Not only was defendant's jury free to ignore his stated purpose, the two acts—escaping from police and assaulting Officer Waubanascum—are not mutually exclusive.

Furthermore, defendant's jury decided defendant's intentional acts, not his motives for acting. Whether defendant's decision to carry Officer Waubanascum alongside his car was a malicious act motivated by his desire to retaliate against Officer Waubanascum for attempting to arrest him, simply a subordinate act motivated by his hope of avoiding arrest, or something less obvious, it was still reasonable for defendant's jury to interpret his acts as intentional and his use of the car as deadly.

E. ISSUES PERTAINING TO DEFENDANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

1. DEFENDANT FAILED TO SHOW THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON SELF-DEFENSE WHEN THERE WAS NO EVIDENCE DEFENDANT ACTUALLY FACED IMMINENT DANGER OF SERIOUS INJURY OR DEATH WHEN HE ASSAULTED TWO UNIFORMED OFFICERS IN AN EFFORT TO AVOID LAWFUL ARREST.

“The standard for review applied to [refusal to instruct the jury on self-defense] depends on whether the trial court's refusal to grant the jury instruction was based upon a matter of law or of fact. A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. The trial court's refusal to give

an instruction based upon a ruling of law is reviewed de novo.” *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998) (citations omitted).

“A trial court abuses its discretion only where the trial court’s decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011) citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12,26, 482 P.2d 775 (1971).

“[T]he general rule in Washington is that reasonable force in self-defense is justified if there is an appearance of imminent danger, not actual danger itself. A different rule applies, however, if one seeks to justify use of force in self-defense against an arresting law enforcement officer. Numerous cases have held a person may use force to resist arrest only if the arrestee *actually*, as opposed to *apparently*, faces imminent danger of serious injury or death.” *State v. Bradley*, 141 Wn.2d 731, 737, 10 P.3d 358 (2000).

Defendant’s proposed jury instructions included two instructions on self defense: WPIC 17.02.01 and WPIC 17. 02. CP 96-114. Acting pro se, defendant first raised his intent to assert self-defense during preliminary motions. RP 80-81. After considering the arguments of defendant, stand-by counsel, and the State, the trial court denied defendant’s motion to assert self-defense. RP 80-88. The trial court left

open the possibility of revisiting its decision after hearing the testimony.
RP 88.

At the conclusion of the evidence, defendant, through stand-by counsel, renewed his motion for a self-defense instruction. RP 265. The trial court stood by its pretrial ruling and refused to include the instruction. RP 466.

The trial court did not abuse its discretion when it refused to instruct defendant's jury on self-defense. The instruction would have been inappropriate because the evidence adduced at trial showed that defendant assaulted two uniformed police officers in the course of a lawful traffic stop when he was not actually facing imminent danger of serious injury or death. As there was no evidence to support the requested instruction, the trial court did not abuse its discretion in failing to give it.

2. DEFENDANT FAILED TO SHOW THE TRIAL COURT ERRED IN DENYING HIS MOTION TO DISMISS FOR FAILURE TO PRESERVE EXCULPATORY EVIDENCE WHEN IT FOUND THE CAR USED IN THE INCIDENT WAS NOT EXCULPATORY AND DEFENDANT MADE NO EFFORT TO EXAMINE IT BEFORE IT WAS SOLD AT PUBLIC AUCTION.

Under CrR 8.3(b) "[t]he court ... may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when

there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." *State v. Athan*, 160 Wn.2d 354, 375-376, 158 P.3d 27 (2007) citing CrR 8.3. The trial court's decisions pursuant to CrR 8.3 are reviewed under an abuse of discretion standard. *Id.* at 376. "Abuse of discretion requires the trial court's decision to be manifestly unreasonable or based on untenable grounds for untenable reasons." *Id.* at 376. "Dismissal of charges is an extraordinary remedy....." *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

Apart from the requirements of CrR 8.3, "to comport with due process, the prosecution has a duty ... to preserve [materially exculpatory] evidence." *State v. Burden*, 104 Wn.App. 507, 512, 17 P.3d 1211 (2001). "If the evidence meets the standard as materially exculpatory, criminal charges against the defendant must be dismissed if the State fails to preserve it." *Id.* at 512 (citation omitted). "A trial court's determination that missing evidence is materially exculpatory is a legal conclusion which we review de novo." *Id.* at 512 (citation omitted).

"Materially exculpatory evidence is evidence which possesses an exculpatory value that was apparent before it was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *State v. Copeland*, 130

Wn.2d 244, 279-280, 922 P.2d 1304 (1996). “A showing that the evidence might have exonerated the defendant is not enough.” *Id.* at 280. “In contrast, where potentially useful evidence is concerned, as opposed to material exculpatory evidence, no denial of due process will be found unless the defendant shows bad faith on the part of the police.” *Id.* at 280.

After law enforcement took approximately thirteen photographs of the car defendant used to assault Officer Waubanasum, a private tow-truck company removed the car from the railroad tracks where defendant abandoned it. RP 66, 68. The car was eventually sold in a public auction; however, prior to the sale defendant received notice that the car had been released to Gene’s Towing. RP 67. In the interim between when the car was towed from the railroad tracks and when Gene’s Towing released it to auction, the car was available for examination. RP 67.

During preliminary motions, defendant moved to dismiss his charges due to the State’s failure to preserve the car. RP 64-66, 69- 70. After considering the briefing, and hearing the parties’ argument, the trial court denied defendant’s motion to dismiss. RP 70. In its oral ruling the trial court found that there was no governmental misconduct in the State’s release of the car to a private company because the State provided defendant notice of the car’s disposition and defendant made no effort to

examine it before it was sold. RP 70. The trial court further found that the defendant had not met his burden to show that the car was exculpatory. RP 70. The trial court also concluded that defendant had other evidence of the vehicle's features. RP 70.

The trial court did not err in denying defendant's motion to dismiss because the car used in the incident was not materially exculpatory and the State did not engage in misconduct. The evidentiary value identified by defendant, i.e., that the height of the car made it factually impossible for the assaults to have occurred as the victims described them, if true, was not an exculpatory value apparent to anyone other than defendant, if at all, before the vehicle was sold. Additionally, defendant had the benefit of comparable evidence in the form of numerous crime-scene photographs of the vehicle, eye witnesses and the testimony of his own expert. RP 64 -71, 149, 150, 436, 450-456.

Furthermore, the record does not support a finding that the car's private auction was the result of bad faith on the part of the police since defendant was provided notice of the car's whereabouts, yet took no action to examine it prior to the sale. RP 64 -71, 149,150, 436, 450-456.

F. CONCLUSION

The evidence showed defendant ignored Officer Waubanascum's repeated requests to be released as defendant dragged him alongside his

car at speeds reaching 20mph for thirty to forty feet. Looking at the evidence in the light most favorable to the State, any reasonable trier of fact could have decided the case as the defendant's jury did—by concluding that defendant assaulted Officer Waubanascum with a deadly weapon.

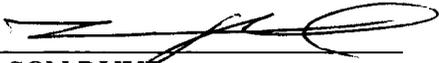
Turning to defendant's statement of additional grounds for review, the trial court was right to refuse defendant's self-defense instruction because defendant assaulted two uniformed officers in an attempt to avoid lawful arrest.

The trial court was equally correct in denying defendant's motion to dismiss due to the sale of the car he abandoned along the railroad tracks, since he failed to take advantage of his opportunity to inspect the car before it was sold and had the benefit of the photographs taken by law enforcement, in conjunction with eyewitnesses and the testimony of his own expert, to make his point about the vehicle's height.

Defendant's convictions should be affirmed.

DATED: June 1, 2011.

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Pierce County
Prosecuting Attorney



JASON RUYF
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WSB # 38725

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STATE OF WASHINGTON

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail of ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6.1.11 Theresa Ka
Date Signature

[Faint, illegible text and signature]