

29958-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BEAU C. GARDEE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

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Court of Appeals
Division III
State of Washington

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering Finding No. 1:

On December 6, 2010, Wapato Police Department Officers Deccio and Madril were called to 3891 N. Track Road in Wapato, WA regarding a domestic incident. Upon arrival they spoke to Sophia Gardee, defendant's mother, and Alberta Mendez, defendant's brother. They told the Officers that the reason for the call was a conflict between Alberto and defendant which involved Alberto throwing out defendant's PEPSI bottle which was full of starter fluid. Starter fluid is ether based.

(CP 52)

2. The court erred in entering Finding No. 2:

Defendant was not present when the Officers arrived. The officers were unable to locate defendant.

(CP 53)

3. The court erred in entering Finding No. 3:

Defendant is known for being addicted to huffing starter fluid which he stored in empty PEPSI bottles for huffing.

(CP 53)

4. The court erred in entering Finding No. 5:

Upon arrival at the Wapato Car Quest, the officer noticed that one of the plate glass windows on the front of the store was broken. After investigating inside, it appeared to the officers that the only product missing was Car Quest brand starter fluid.

Officer Deccio suspected that defendant was involved in the burglary.

(CP 53)

5. The court erred in entering Finding No. 15:

The three cans of Car Quest brand starter fluid were destroyed per Wapato Police Department policy based on their containing hazardous material. There was no bad faith on the part of the Wapato Police Department in the destruction of the three starter fluid cans.

(CP 54)

6. The court erred in entering Finding No. 16:

Starter fluid contains ether which is highly flammable and could be used as a weapon.

(CP 54)

7. The court erred in entering Conclusion No. 1:

The cans of Car Quest brand Starter fluid that were taken as evidence in this case and subsequently destroyed had no evidentiary value over and above any similar starter fluid can that can be purchased from Car Quest. Therefore, the starter fluid cans were neither materially exculpatory, nor potentially useful.

(CP 54)

8. The court erred in entering Conclusion No. 3:

The can of Car Quest brand starter fluid round on the ground under where defendant was handcuffed was not obtained via a search and all evidence relating to it is admissible.

(CP 55)

9. The court erred in entering Conclusion No. 4:

Officers had a right to be where they were when they arrested defendant.

(CP 55)

10. The court erred in entering Conclusion No. 5:

Officers had reasonable suspicion to believe that defendant was armed and dangerous based on his being in possession of starter fluid, which contains ether and is highly flammable.

(CP 55)

11. The court erred in entering Conclusion No. 6:

The can of Car Quest brand starter fluid found hanging out of defendant's pocket, and the PEPSI bottle filled with starter fluid were obtained following a legal *Terry* frisk search.

(CP 55)

12. The court erred in entering Conclusion No. 7:

The can of Car Quest brand starter fluid found hanging out of defendant's pocket and the PEPSI bottle containing starter fluid were also obtained through a plain view search.

13. The court erred in denying the defense motion to suppress the fruits of the unlawful seizure.

14. The court erred in denying the motion to dismiss based on the *Brady* violation.

B. ISSUES

1. Officers investigating a burglary in which it appeared starter fluid might have been taken saw an individual outside the building that had been burglarized half an hour to an hour before. They knew this person had inhaled starter fluid fumes in the past. Seeing them, he turned to walk away, they ordered him to stop, and he continued walking. Did the officers violate provisions prohibiting unreasonable seizures, Const. art. I, § 22 and the Fourth Amendment, by grabbing the individual, taking him to the ground and handcuffing him before making any inquiries whatsoever?
2. In the course of seizing and searching the suspect, the officers found two cans of starter fluid. The suspect told them he had earlier purchased the cans at a different store in a nearby town. The cans bore printed numbers, identified as part numbers and lot numbers placed on the cans by the manufacturers. Did the officers violate due

process by returning the cans to the owner of the building, without notice to the defendant, and telling the court and defense counsel that the cans had been destroyed pursuant to department policy?

C. STATEMENT OF THE CASE

Beau Gardee has a history of inhaling the fumes from automobile starter fluid. (RP 6, 15)

Around 9:45 p.m. on the evening of December 6, law enforcement officers responded to a domestic disturbance call at Mr. Gardee's home in Wapato. (RP 15) Mr. Gardee had been in an altercation with his brother, and then left the residence. (RP 15) During a brief investigation, Officer Deccio smelled ether in the Gardee home. (RP 16, 23)

Sometime between 9:30 and 10:00 pm, Riley Gangle, the owner of the Wapato Carquest Auto Parts store, was advised that an alarm was going off at his store. (RP 4) He asked the alarm company to be sure it wasn't an accidental tripping of the alarm and to let him know if he needed to go to the store. (RP 4)

About twenty minutes after he left the Gardee residence, Officer Deccio received a dispatch to the Carquest store. (RP 16, 24) When he arrived at the store at 10:28 p.m., Officer Deccio saw that a window had

been broken. (RP 16, 19) He went into the store through the window and saw that cans of starter fluid and steering stabilizer had been disturbed. (RP 17, 26) Officer Deccio suspected that cans of starter fluid were missing and that Mr. Gardee was involved. (RP 18) After Officer Madril had taken photographs of the scene, the officers waited in their patrol car for the arrival of the store owner. (RP 19)

At 10:48 p.m., Officer Deccio saw Beau Gardee walk out from behind the Carquest store. (RP 19) On seeing the officers he turned and walked away. (RP 19) The officers jumped from their car, moved towards Mr. Gardee and several times ordered him to stop. (RP 20) When he failed to do so, Officer Madril took hold of him, took him to the ground and handcuffed him. (RP 20)

They got Mr. Gardee up off the ground and Officer Madril began a pat-down search. (RP 20) The officer found a can of Carquest brand starter fluid in Mr. Gardee's pocket and another lying on the ground. (RP 20) A 20-ounce Pepsi bottle was also found in Mr. Gardee's pocket. (RP 21) It had been filled with some sort of clear material. (RP 22) Officer Deccio sniffed the bottle and it smelled of ether or starter fluid. (RP 22)

Mr. Gardee explained that he had purchased the cans of starter fluid at the Carquest store in Yakima earlier in the evening. (RP 21) Mr.

Gangle arrived at the store and determined that three cans of starting fluid were missing from his inventory.¹ (RP 13) The State charged Mr. Gardee with burglary, malicious mischief, and unlawful inhalation of fumes.² (CP 84)

Before trial, the defense moved to suppress the cans and bottle found in the course of seizing Mr. Gardee. (CP 11) Following a pretrial hearing, the court denied the motion. (RP 57)

Defense also moved to dismiss the burglary charge, alleging the State had failed to record the lot numbers from the cans of starter fluid found on Mr. Gardee's person and had destroyed the cans. (CP 11-13) Defense argued that if the lot numbers on the cans did not match the numbers on the cans remaining in Mr. Gangle's store, and did match the cans in the Yakima Carquest store, that would strongly support Mr. Gardee's claim that he had bought the cans in Yakima and had not burglarized the Carquest store. (CP 13-14)

At a pretrial hearing on the motion to dismiss, Officer Deccio told the court the cans had been destroyed pursuant to department policy that prohibits tagging flammable items into evidence. (RP 28) Mr. Gangle

¹ Because the issues on appeal relate to the propriety of the court's denial of the motions to suppress and to dismiss, the factual summary presented to this point is based solely on the testimony presented at the hearing on those motions.

² The Unlawful Inhalation charge was dismissed.

testified that he does not use the lot number and would not be able to identify the store from which the cans came based on the lot number. (RP 10-11) The court denied the motion to dismiss. (CP 57)

At trial, Officer Deccio described the events leading to Mr. Gardee's arrest. (RP 336-340) He testified that Mr. Gardee claimed to have purchased the starter fluid in Yakima at "8:00 o'clock p.m." (RP 341-42) Mr. Gangle told the jury that the Yakima Carquest store closes at 6:00 p.m. (RP 322)

Officer Deccio told the court that since department policy prohibits tagging flammable liquids, the cans of starter fluid were returned to Mr. Gangle. (RP 341)

After the State had rested its case, the court dismissed the charge of unlawful inhalation. (RP 391, 406)

D. ARGUMENT

1. THE COURT SHOULD HAVE SUPPRESSED THE FRUITS OF THE UNLAWFUL SEIZURE OF THE DEFENDANT.

In reviewing the denial of a suppression motion, the court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Evidence is

substantial when it is enough “to persuade a fair-minded person of the truth of the stated premise.” *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999). Conclusions of law from an order pertaining to the suppression of evidence are reviewed *de novo*. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

As a general rule, warrantless searches and seizures are *per se* unreasonable, in violation of the Fourth Amendment and article I, § 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d at 171. The rule is subject to a few jealously and carefully drawn exceptions including consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997).

Police may briefly detain a suspect for investigation when an officer has a reasonable and articulable suspicion that the person is involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). If the stop is unlawful, any evidence obtained from a subsequent search must be suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

Officer Deccio testified that he suspected Mr. Gardee when he saw that the starter fluid cans had been disturbed. (RP 17-18) He had arrested Mr. Gardee in the past for using starter fluid and Mr. Gardee’s family had

told him Mr. Gardee had been inhaling starter fluid fumes earlier that evening. (RP 14-15) Mr. Gardee appeared at the scene of the burglary 22 minutes after the officers' arrival, walked away when he saw the officers and failed to stop when ordered to do so. (RP 19-20) The trial court did not, however, rely solely on these facts in determining whether to grant the suppression motion.

The trial court found that Mr. Gardee's family told the officer Mr. Gardee's brother had thrown out Mr. Gardee's Pepsi bottle, which was "full of starter fluid." (Finding No. 1) The officer testified that the bottle that was reportedly thrown was a soda bottle, not specifically a Pepsi bottle and, more importantly, there is no evidence that soda bottle was full of starter fluid. (RP 15)

The court found the officers were unable to locate Mr. Gardee when they arrived at the Gardee residence. (Finding 2) No one testified that the officers made any effort to locate Mr. Gardee. The court found that Mr. Gardee is known for being addicted to starter fluid. (Finding 3) No one testified to Mr. Gardee's possible addiction or to any knowledge thereof. The officer merely testified that he knew Mr. Gardee had inhaled starter fluid fumes in the past and earlier that evening. (RP 14-15)

The court found that starter fluid was the only thing that appeared to be missing. (Finding 5) Officer Deccio testified that in looking around

to see if anything obviously was missing he noticed a can of steering fluid had been knocked over, a bottle of steering fluid appeared to be missing, the starter fluid cans appeared to be out of place, and this made him suspect starting fluid was also missing. (RP 18, 25-26).

The court's oral ruling provides no guidance for determining whether, or to what extent, the court relied on the erroneous factual findings. But the court's erroneous belief that Mr. Gardee was known to be an addict, that his supply of starter fluid had been thrown away, and that cans of starter fluid appeared to be missing, may have influenced the court's implicit ruling.

The court did not enter any finding that the initial detention of Mr. Gardee was based on an articulable suspicion that he was involved in criminal activity.

In determining whether an intrusion on an individual falls within the proper scope of an investigatory stop or must be supported by probable cause to arrest, a court considers three factors: (1) the purpose of the stop; (2) the amount of physical intrusion upon the defendant's liberty; and (3) the length of time the defendant is detained. *State v. Wheeler*, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987)

The court made no express findings respecting the purpose of the stop. It may be presumed the court found the stop was for the purpose of investigating whether Mr. Gardee was involved in the apparent burglary.

The amount of physical intrusion on Mr. Gardee's liberty was substantial. He was physically forced to the ground and handcuffed before any questioning had occurred. He was then forced to get up off the ground and was subjected to a search of his clothing.

A warrantless, protective frisk of a defendant is authorized if (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the frisk, and (3) the scope of the frisk is limited to the protective purpose. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). A search for weapons must be objectively reasonable, based on the officer's subjective perception of the event. This means the officer must be able to articulate reasons supporting a belief that his safety may be compromised if he does not undertake a protective search and such belief must be objectively reasonable. *State v. Coutier*, 78 Wn. App. 239, 244, 896 P.2d 747 (1995). A police officer can put handcuffs on a defendant only when he or she has a legitimate fear of danger. *State v. Wheeler*, 108 Wn.2d at 236, (quoting *State v. Williams*, 102 Wn.2d 733, 740 n. 2, 689 P.2d 1065 (1984))

The court found that starter fluid contains ether, ether is highly flammable and could be used as a weapon. (Finding 16) The court concluded the officers had a reasonable suspicion that Mr. Gardee was “armed and dangerous based on his being in possession of starter fluid, which contains ether and is highly flammable.” (Conclusion 5)

The only evidence pertaining to whether ether is flammable was Officer Deccio’s statement that the cans of starter fluid found in the course of the search were destroyed because of a department policy that prohibits tagging flammable material into evidence. (RP 28) No one testified that ether was flammable or that starter fluid could be used as a weapon. The officer did not testify that he had any suspicion that Mr. Gardee was armed and dangerous or that a protective search was necessary for his safety.

The evidence did not support the court’s finding, and that finding, without more, was wholly insufficient to support the conclusion that the search was justified by the officers’ reasonable suspicion Mr. Gardee was armed and dangerous.

Because the trial court did not enter any conclusion of law with respect to whether the initial detention of Mr. Gardee was based on a reasonable suspicion, there is no conclusion for this court to review *de novo*. Assuming that such a conclusion may be inferred from the court’s ruling denying the motion to suppress, however, the evidence in the record

that would support such a conclusion is *de minimis*: Mr. Gardee, an individual known to have inhaled starter fluid in the past, was seen about a third of a mile from his home, in the vicinity of a store that had been burglarized within the last hour, and in which cans of starter fluid had been disturbed, and upon seeing police officers he turned and walked away.

Even if the officers had the requisite reasonable suspicion, however, their conduct was not justified by the purpose of the stop or by any reasonable fear of danger. The officers were investigating a burglary involving property damage and possible theft. The officers had not found evidence that anyone had been injured in the course of the crime. The person they stopped had no history of weapons use or violence. No evidence showed that the officers knew or suspected that starter fluid is flammable. There is no evidence that starter fluid can be, or ever has been, used as a weapon. Officer Deccio did not testify that he feared for his safety, or that the manner of Mr. Gardee's seizure was based on a belief that Mr. Gardee was armed and dangerous.

Because the police action exceeded the proper scope of a valid investigative stop, it can be justified only if supported by probable cause to arrest. *State v. Wheeler*, 43 Wn. App. 191, 196, 716 P.2d 902 (1986) (*citing Williams*, 102 Wn.2d at 741).

The lawfulness of an arrest depends on the existence of probable cause. Const. amend. IV; Wash. State Const. art. I, § 7; *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 849, 43 P.3d 43 (citing *State v. Green*, 70 Wn.2d 955, 958, 425 P.2d 913, *cert. denied*, 389 U.S. 1023 (1967)), *review denied*, 147 Wn.2d 1024 (2002). Probable cause for a warrantless arrest exists where the facts and circumstances within the arresting officer's knowledge are sufficient to permit a reasonable person to believe that an offense is being committed. *Jacques v. Sharp*, 83 Wn. App. 532, 536, 922 P.2d 145 (1996) (citing *Gurno v. Town of LaConner*, 65 Wn. App. 218, 223, 828 P.2d 49, *review denied*, 119 Wn.2d 1019 (1992)).

Once they had searched Mr. Gardee, the officers knew he possessed two cans of starter fluid. Shortly thereafter, the store owner told them that three cans of starter fluid were missing from his inventory, and another officer had found a third can of starter fluid behind the store. Once they had arrested Mr. Gardee, he told what they believed was a lie about where he had obtained the starter fluid found in his possession. None of these facts were known to the officers when they threw Mr. Gardee to the ground and handcuffed him. The few facts known to the officers were, at best, a reason to detain him and ask him to explain his presence near a crime scene. They were not sufficient to justify a full-

blown arrest based on probable cause to believe Mr. Gardee had committed a felony.

The court also concluded the officers “had a right to be where they were when they arrested defendant,” the can of starter fluid found on the ground where Mr. Gardee had been lying was not found in the course of a search, and the can and bottle found in his clothing were “obtained through a plain view search.” (CP 55) The court found these items were discovered after Mr. Gardee had been taken to the ground and placed in handcuffs. (CP 53)

The plain view doctrine requires: “(1) a prior justification for police intrusion--whether by warrant or by a recognized exception to the warrant requirement; 2) an inadvertent discovery of incriminating evidence; and (3) immediate knowledge by police that they have evidence before them.” *State v. Lair*, 95 Wn.2d 706, 714, 630 P.2d 427 (1981).

Absent a reasonable belief that Mr. Gardee was armed and dangerous, the officers were not justified in throwing Mr. Gardee to the ground, handcuffing him, and standing him back up again. There was no prior justification for this police intrusion into Mr. Gardee’s liberty.

The court entered a conclusion of law stating the officers “had a right to be where they were when they arrested defendant.” (CP 55) The officers had a right to be wherever they were at the time of the arrest only

if they had probable cause for the arrest based on lawfully obtained evidence. The evidence necessary to support the arrest included the bottle and cans found in the course of seizing and searching Mr. Gardee. The cans and bottle were the fruit of an unlawful seizure and search and do not provide probable cause for the arrest.

The police intrusion for which prior justification is required to bring the discovery of evidence within the plain view doctrine must be the intrusion which gave rise to the discovery, not the subsequent arrest on the basis of the discovered evidence. The “conclusion” is irrelevant.

The evidence does not support an inference the officers were justified in throwing Mr. Gardee to the ground, handcuffing him, and then bringing him back to his feet. There is no prior justification for this intrusion – the officer did not testify he had any fear that Mr. Gardee was armed. The court properly found the cans and bottle were only seen after the intrusion; there is no evidence they were in plain view when the officers initiated the intrusion.

A trial court may not constitutionally admit evidence obtained by an illegal search. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). Such error is harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. McReynolds*, 117 Wn. App. 309, 326,

71 P.3d 663 (2003). Without the cans and bottle found in the course of detaining Mr. Gardee, no jury could reasonably find him guilty based on the proximity to the scene as much as an hour after the burglary together with his propensity for inhaling starter fluid fumes.

2. THE STATE VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY CONCEALING THE WHEREABOUTS OF ITEMS SEIZED AT THE TIME OF HIS ARREST AND RELEVANT TO HIS DEFENSE.

The prosecution has a duty to disclose to the defense all material exculpatory evidence in its possession. U.S. Const. amends. 6, 14; Const. art. I, § 3, 22; *Kyles v. Whitley*, 514 U.S. 419, 432-38, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

Violations of the duty to disclose are reviewed *de novo*. *State v. Mullen*, 171 Wn.2d 881, 259 P.3d 158, 165 (2011).

There are three components to a *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

Non-disclosed evidence is material, and must be disclosed, if there is a reasonable probability that had it been disclosed to the defense, it would have affected the outcome of the case. *Kyles*, 514 U.S. at 433; *Bagley*, 473 U.S. at 682. Evidence is material if its absence undermines confidence in the verdict. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 428-29, 114 P.3d 607 (2005).

“The animating purpose of *Brady* is to preserve the fairness of criminal trials.” *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir.2006) (citing *Brady*, 373 U.S. at 87, 83 S. Ct. 1194). “The *Brady* rule is not meant to ‘displace the adversary system’; ‘the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose *evidence* favorable to the accused, that, if suppressed, would deprive the defendant of a fair trial.’ ” *Id.* (quoting *Bagley*, 473 U.S. at 675, 105 S. Ct. 3375).

State v. Mullen, 259 P.3d at 166.

Lot numbers may be used to identify the store from which a manufactured item was probably obtained. See *State v. Luvene*, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). Mr. Luvene was charged with murder arising in the course of robbery of the Milton liquor store. The state sought to admit into evidence a survey of the lot numbers on liquor bottles from other liquor stores in the area. The survey indicated that while the lot numbers on all four of the bottles recovered from Mr.

Luvene's apartment matched lot numbers found at the Milton liquor store, none of the lot numbers matched the inventory in the store where he claimed he bought the liquor. 127 Wn. 2d at 706.

The court ruled the lot numbers from the liquor bottles were relevant and therefore admissible:

When a liquor store submits an order, the order is filled without regard to lot number. Nevertheless, because liquor bottles are shipped by the box, and each box contains liquor bottles with the same lot number, the liquor survey evidence has at least some tendency to make the inference that the liquor found in Mr. Luvene's apartment came from the Milton liquor store "more probable ... than it would be without the evidence"

127 Wn. 2d at 707.

Luvene demonstrates precisely why manufactured items allegedly stolen in the course of a crime should be preserved and made available to the defense. As defense counsel pointed out to the court, if the lot numbers on the cans found in Mr. Gardee's possession differed from the lot numbers on the cans remaining in Mr. Gangle's store, and did match the lot numbers on cans in the Yakima store, the evidence would give rise to a very strong inference that Mr. Gardee was telling the truth about where he got the starter fluid, and that the officers misunderstood him when they thought he claimed to have bought it at a time when the Yakima store was closed. His possession of cans of starter fluid was the

most significant evidence of guilt, and evidence that he had obtained the starter fluid at a different store would be exculpatory. That the defense was prevented from obtaining this evidence certainly undermines confidence in the jury's verdict.

Mr. Gangle testified that he was unable to identify which store a particular can of starter fluid came from. (RP 5) He acknowledged that two different numbers appeared on the cans, a part number and a lot number, and the numbers were likely printed by the manufacturer. (RP 9) Based solely on this testimony, the court concluded:

The cans of Car Quest brand Starter fluid that were taken as evidence in this case and subsequently destroyed had no evidentiary value over and above any similar starter fluid can that can be purchased from Car Quest. Therefore, the starter fluid cans were neither materially exculpatory, nor potentially useful.

(CP 54)

Whether Mr. Gangle personally could determine the store location from which cans were purchased based on the lot number was not an issue. The issue was whether a jury, given an opportunity to compare lot numbers from nearby stores to the lot numbers on the allegedly stolen items, could draw a reasonable inference as to the truth of Mr. Gardee's claim.

The trial court concluded the cans of starter fluid “had no evidentiary value over and above any similar starter fluid can that can be purchased from Carquest. Therefore, the starter fluid cans were neither materially exculpatory, nor potentially useful. The court’s conclusion disregards the theory of the defense case, which was fully explained by counsel. No other cans could provide the relevant lot numbers that would have tied the evidence to the Yakima store and exonerated Mr. Gardee.

The obligation to disclose exists even when the evidence is not specifically requested by defense. *Kyles*, 514 U.S. at 432-38; *United States v. Agurs*, 427 U.S. at 110. The arresting officers clearly understood that Mr. Gardee was claiming he had obtained the cans of starter fluid from the Yakima store. The identifying numbers were plainly visible on the cans. And as the *Luvone* case demonstrates, the significance of lot numbers is not unknown to law enforcement.

Officer Deccio misled defense counsel and the court when he testified at the pretrial hearing that the cans had been destroyed, and then told the jury the cans had been returned to Mr. Gangle. Had the correct information been provided to defense counsel in a timely manner, the evidence might still have been retrieved and used in Mr. Gardee’s defense.

Prejudice occurs “ ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would

have been different.’ ” *Strickler*, 527 U.S. at 280, (quoting *United States v. Bagley*, 473 U.S. at 682).

“[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal. *Kyles*, 514 U.S. at 434. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. ... A “‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression undermines the confidence in the outcome of the trial.”

Here, as in *Luvone*, the lot number evidence was central to Mr. Gardee’s defense. Officer Deccio’s decision to return the marked cans to Mr. Gangle, and his failure to disclose the likely location of the cans to the defense, seriously undermines confidence in the outcome of this trial.

(emphasis added) *Id.* at 434 (quoting *Bagley*, 473 U.S. at 678).

The State’s failure to disclose the whereabouts of the cans violated due process.³

Although the failure to disclose the location of the evidence may be a *Brady* violation, by the time of trial the failure to disclose had become, in effect, destruction of the evidence. The State’s conduct

³ The motion to dismiss did not mention the malicious mischief charge. It should be evident, however, that if Mr. Gardee had been able to present evidence to rebut the burglary charge, that evidence would necessarily undermine confidence in the jury verdict on the malicious mischief charge as well. This court should recognize that the omission of the malicious mischief charge from the motion to dismiss was a scrivener’s error, and should reverse both convictions.

accordingly is subject to evaluation under *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)

Under both the Washington Constitution and the United States Constitution, due process requires that the State preserve material exculpatory evidence. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). For evidence to be materially exculpatory, two requirements must be met: the evidence's exculpatory value must have been apparent before it was destroyed, and the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonable means. *Wittenbarger*, 124 Wn.2d at 475; *California v. Trombetta, supra*. If the State fails to preserve "material exculpatory evidence," the charges must be dismissed. 124 Wn. 2d at 475. The trial court's determination as to whether missing evidence is materially exculpatory is reviewed *de novo*. *State v. Burden*, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001).

The foregoing *Brady* analysis demonstrates that these criteria are met here. The value of manufacturers' lot numbers is known to law enforcement. Mr. Gangle testified the lot numbers were visible on the cans, although they were indecipherable in the photographs taken by police. No comparable evidence exists.

And even if the evidence were only “potentially useful” to the defense, failure to preserve the evidence violates due process if the State has acted in bad faith. *Wittenbarger*, 124 Wn.2d at 477; *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). Officer Deccio’s misleading testimony regarding the disposition of the evidence shows the State acted in bad faith.

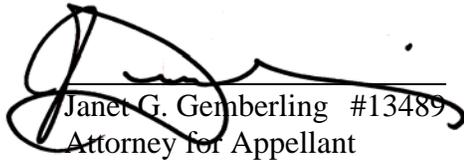
The State’s failure to preserve evidence that is “material and exculpatory” violates a defendant’s right to due process regardless of whether the State acted in bad faith. *State v. Wittenbarger*, 124 Wn.2d at 475. In order for evidence to be considered material exculpatory evidence, “the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Wittenbarger*, 124 Wn.2d at 475 (citing *California v. Trombetta*, 467 U.S. at 489). Evidence that is not material exculpatory evidence is only potentially useful to the defense. *Wittenbarger*, 124 Wn.2d at 477. If the State fails to preserve only potentially useful evidence, the State has not violated the defendant’s right to due process unless the defendant can show the State acted in bad faith. *Wittenbarger*, 124 Wn.2d at 477 (citing *Arizona v. Youngblood*, 488 U.S. at 58).

E. CONCLUSION

The cans and bottle found in the course of detaining Mr. Gardee were central to the State's case. The court erred in denying the defense motion to suppress. And the State's failure to disclose the whereabouts of the cans of starter fluid has permanently deprived Mr. Gardee of the only evidence that can establish his innocence. The charges should be dismissed.

Dated this 28th day of November, 2011.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29958-9-III
)	
vs.)	CERTIFICATE
)	OF MAILING
BEAU C. GARDEE,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on November 28, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes
kevin.eilmes@co.yakima.wa.us

and

I certify under penalty of perjury under the laws of the State of Washington that on November 28, 2011, I mailed a copy of the Appellant's Brief in this matter to:

Beau C. Gardee
#850467
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

Signed at Spokane, Washington on November 28, 2011.


Janet G. Gemberling #13489
Attorney for Appellant