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Supreme Court No. 93119-4
COA No. 72331-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS ARMSTRONG,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Jim Rogers

SUPPLEMENTAL BRIEF

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I. IDENTITY OF PETITIONER

This Court granted review of the decision in COA No. 72331-6-I that affirmed Dennis Armstrong's conviction for felony violation of a no-contact order, under RCW 26.50.110(5), or (4). The crime allegedly occurred at a Metro bus stop next to an AM/PM store in Seattle.

II. ISSUES PRESENTED ON REVIEW

Issue 1. Article 1, § 21 guarantees a unanimous jury verdict. Where a crime may be committed by alternative means, the right is violated where a court instructs the jury that it need *not* be unanimous. Instead, the jury must be instructed that unanimity on the means is required. Sufficiency of the evidence on both means can never be a basis to affirm. Here, per WPIC 4.23, the jury was affirmatively told it need not be unanimous as to which means of the felony violation (assault or two prior offenses) was committed. Is reversal required for structural error under Sullivan v. Louisiana? Alternatively, is reversal required where the constitutional error was not harmless beyond a reasonable doubt, under Chapman v. California?

Issue 2. Before taking Mr. Armstrong to jail, the arresting officers threatened him repeatedly that they had the "whole incident on video," and if he did not tell the truth, the AM/PM store videotape

would "go to court." Yet the responding police officers never collected the video. Was Due Process violated under U.S. Const. amend. 14, § 1?

III. STATEMENT OF THE CASE

Allegations. Mr. Armstrong was waiting at a Metro bus shelter when the complainant Nadia Karavan, who was protected by a no-contact order, spotted him there. Karavan walked down the block and across the street, and contacted Mr. Armstrong at the Metro bus shelter, which was "right in front of the [AM/PM] store." Shortly thereafter, she went into the adjacent AM/PM convenience store and had the clerk call 911. At trial, Karavan claimed Armstrong punched her as she sat at the bus stop, that he pounded the plexiglass wall of the bus shelter so hard it almost broke, that he punched her again, and that he followed her into the AM/PM. 7/29/14RP at 38-46, 60-62.

AM/PM video. Police officers who arrested the defendant near the AM/PM recorded their interactions with him on a police car recording system. 7/28/14RP at 22, 24-25; 7/29/14RP at 74; Exhibit 3. Officers Milton Rodrigué and Albert Elliott together told Mr. Armstrong he needed to "tell the truth" because they "got you on video." Officers said they had obtained the AM/PM video, or were going to get it, and if

Armstrong lied to them about what happened, the video "goes to court." 7/29/14RP at 78-80; 7/30/14RP at 30-33; Exhibit 3.

Todd Hawkins, the AM/PM store clerk, confirmed at trial that one of the AM/PM's cameras showed a low view of the Metro bus stop. However, the videotape footage of that day's incident – which Hawkins had personally viewed in the store's security office – was never requested by the police. 7/30/14RP at 44-48, 50-52.

At trial, the court responded to Mr. Armstrong's repeated complaints asking where the AM/PM video was, by telling him that there had never been a videotape for his lawyer to obtain. 7/29/14RP at 7-9. The State then revealed that Todd Hawkins had stated that morning that there was a video, but it had been recycled. 7/30/14RP at 9; see 7/28/14RP at 36-38. The prosecutor also claimed that Mr. Hawkins' knowledge of the video was "second- or third-hand," an assertion seemingly belied by Hawkins' extensive testimony later that day. 7/30/14RP at 9; see 7/30/14RP at 35 to 53.

Closing argument. In closing argument, the deputy prosecutor told Mr. Armstrong's jury that, under instruction 11, unanimity on the means was not required to find the defendant guilty beyond a reasonable doubt. Therefore, the State urged, the jury could convict,

even if 6 of the 12 jurors did not think the State had proved "assault," if they believed Armstrong had "two prior offenses." 7/31/14RP at 17-18; WPIC 4.23 and CP 28 (Instruction 11), set forth infra.

IV. ARGUMENT

1. REVERSAL IS REQUIRED FOR UNANIMITY ERROR UNDER ARTICLE 1, § 21 OF THE WASHINGTON CONSTITUTION.

Sufficiency of the evidence on both alternative means can never be a basis to affirm a jury verdict, if unanimity is required under art. 1, § 21 and this Court's unanimity case law. First, the presence of sufficient evidence on both means does not provide a basis to infer that a jury indeed *was* unanimous after all. Second, the presence of sufficient evidence on both means cannot *excuse* the absence of assurances of unanimity, because it is an independent right. Certainly, in this case, where instruction 11 *affirmatively* told the jury it need not be unanimous as to the means, this was structural error requiring reversal without resort to harmless error analysis.

(a). The affirmative violation of Mr. Armstrong's art. 1, § 21 right to a unanimous jury requires reversal as structural error.

Criminal defendants in Washington possess a constitutional right under art. 1, § 21 to a unanimous jury verdict. In alternative means

cases, this requires the jury of 12 to unanimously agree on which means is the basis for conviction. In State v. Ortega-Martinez, the Court stated:

> In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the means by which the defendant is found to have committed the crime.

State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); see also State v. Owens, 180 Wn.2d 90, 95 and n. 2, 323 P.3d 1030 (2014); State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987).

On the other hand, some statements of the Court have indicated that "unanimity" carries utility only because it may allow a guilty verdict to be affirmed on appeal, when one means was not supported below:

> The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.

Ortega-Martinez, at 707-08 (emphasis in original, citations omitted).

These cases have also resulted in a pattern jury instruction, which tells juries, at the trial level, that they need not be unanimous on

the alternative means *in the first place*. WPIC 4.23 (2005) (and Comment).

> To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (4)(a), or (4)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

CP 28 (Jury instruction 11). At a minimum, this instruction and WPIC 4.23 are erroneous. Mr. Armstrong's defense was that he did not hit, punch, or assault Ms. Karavan. 7/31/14RP at 32-38.

In closing argument, the prosecutor responded to this defense, by taking tactical advantage of instruction 11 in a manner that shows why WPIC 4.23 thoroughly eviscerates unanimity under art. 1, § 21 as a Washington constitutional right.

(b). <u>Tactical advantage</u>.

The State told the jury that 6 of them could find the felony element satisfied by the "assault" alternative means, and the other 6 jurors could find it satisfied by the "two prior offenses" means:

> But the kind of secondary paragraph that says, that speaks about unanimity, so whether or not you have to be unanimous -- that's a hard word to say -- it's essentially instructing you that if **six of you** believe that: Hey look, we don't know if you've been twice previously convicted but we believe you assaulted her and **six of you** say: We think he's been twice previously convicted but we don't know if he assaulted her but we do believe he violated the no-contact order by going to her residence that that's guilty. So

> you don't have to be unanimous as to which of the alternative means were present; you just have to be unanimous that all four of the elements have been satisfied.

7/31/14RP at 17-18 (State's closing argument) (emphasis added).

The jury instruction that permitted this argument was error. In Ortega-Martinez, this Court endorses the existence of an independent right to unanimity by searching for a *substitute* manner of satisfying unanimity, which therefore must be a constitutional requirement in itself. Ortega-Martinez, at 707-08 (". . . we infer that the jury rested its decision on a unanimous finding as to the means.") (emphasis added). And, if unanimity as to the means is a right accorded to defendants by the Washington Constitution, it must be protected at the trial level.

(c). Once statutory construction determines under *State v. Owens* that a charged criminal offense does involve "alternative means," jury unanimity on the means is required.

This area is highly context-dependent, because it is unlike Petrich unanimity cases, where it is readily apparent when there are multiple "acts" such as assaults, drug possessions, etc., each of which could be selected by the jury as evidentiary proof of the single charged count. See State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

Every alternative 'means' question, on the other hand, requires statutory construction. This Court has shown its unwillingness to

liberally insert alternative means doctrine into statutes in which the legislature has only described mere ways, or manners, of committing a single-means crime. State v. Arndt, 87 Wn.2d 374, 378-383, 553 P.2d 1328 (1976). Recent decisions have emphasized the strict criteria necessary to show that an RCW offense sets forth "alternative means." See, e.g., State v. Owens, 180 Wn.2d at 99 (statute sets out alternative means only if it establishes distinct acts, that are not closely related, as opposed to acts where one's conduct does not vary significantly); State v. Sandholm, 184 Wn.2d 726, 364 P.3d 87 (2015); see also State v. Peterson, 168 Wn.2d 763, 230 P.3d 588 (2010).

Owens and the other cases represent this Court's careful analytical approach to the question of alternative means. However, once a statute is deemed to set forth alternative means, the different means represent distinct and dissimilar statutory alternatives, which each punish fact patterns that vary too greatly to be considered simply as descriptions of mere ways of committing a single-means crime. See Owens, supra.

Justice Utter's dissenting opinion in State v. Franco applies the unanimity principles of this Court and will obtain a correct result, and inconsistent decisions can be disavowed. See Sandholm, 184 Wn.2d at

736. The task of establishing criteria for whether a statute sets out alternative means is broad, and answers are not obviously apparent, but once the task is completed and alternative means are discerned, the court must require unanimity on the means. State v. Franco, 96 Wn.2d 816, 833-35, 639 P.2d 1320 (1982)[1] (Utter, J., dissenting).

Irrespective of sufficiency, a case in which a jury splits 6 and 6 on alternative factual theories of different means is not a case in which a single, comprehensible basic fact pattern has been proved to the entire jury of 12 beyond a reasonable doubt. See Franco, at 838 n. 4 (Utter, J., dissenting); see also People v. Olsson, 56 Mich. App. 500, 505-06, 224 N.W.2d 691 (1974) (reversing because some jurors may have voted for felony murder while the remaining members may have voted for premeditated murder, and, "Such a verdict would not be unanimous and could not convict defendant.").

As Justice Utter recognized, article 1, § 21's requirement of a unanimous verdict on the means is closely related to the prosecution's Due Process burden to prove every fact necessary to conviction beyond a reasonable doubt. Id., at 831-32 (citing In re Winship, 397 U.S. 358, 90

[1] Franco's holding that RCW 46.61.502 (1979) created multiple alternative means of being affected by an intoxicant(s) while driving was overruled by Sandholm.

S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14). Proving guilt to the jury of 12 should require all the jurors to be in substantial agreement as to just what the defendant factually did in order to merit conviction and loss of liberty. Id., at 831-32.

After applying Owens' parameters, when a case is determined to be one of an alternative means statutory offense, then proving two different alternative theories of the crime -- one to six jurors, and another to the other six - is no less of a unanimity error than it would be to convict a defendant for a crime entitled 'felony property conversion' by proving theft by fraud to six jurors, and taking by robbery to the other six. These two theories are too different factually, under Owens, and under Justice Utter's understanding of unanimity's inseparable relationship to Winship, to be able to say that any definable, circumscribable fact pattern has been agreed upon beyond a reasonable doubt by all 12 members of the jury. See State v. Saunders, 992 P.2d 951, 966 (Utah 1999) (stating in dicta when reversing in a Petrich-type multiple acts case, under Utah's Article 1, section 10, that "[n]or would a guilty verdict be valid if some jurors found a defendant guilty of robbery while others found him guilty of theft, even though all jurors agree that he was guilty of some [taking of property] crime.").

This Court should make clear that 12-juror unanimity on the means is an independent right under Const. art. 1, § 21, not just a doctrine that avoids reversal in sufficiency challenges where there is inadequate evidence on one of the means. See Franco, 831-32 and n. 1 (Utter, J., dissenting). Other states have recognized that the jury cannot be instructed in a manner that renders unanimity on the means unnecessary, and that sufficiency is immaterial. For example, in State v. Boots, 308 Or. 371, 374-81, 780 P.2d 725 (1989), the Court reversed an aggravated murder conviction without regard to sufficiency of the evidence, where the jury was instructed contrary to Const. Art. 1, § 11 that "[a]ny combination of twelve jurors agreeing that one or the other or both occurs is sufficient to establish this offense."

Neither can sufficiency excuse an absence of unanimity. The Washington constitution protects unanimity as an independent constitutional requirement in itself. Therefore, the right to a unanimous verdict is not satisfied simply because a sufficiency challenge on appeal of the case would fail. See Commonwealth v. Berry, 420 Mass. 95, 111-12, 648 N.E.2d 732 (1995) (holding that despite sufficiency on both means, the common law unanimity right demanded that future juries be told they must be unanimous).

Here, of course, Mr. Armstrong's jury was *affirmatively* instructed to the contrary. This directive thoroughly contravenes this Court's unanimity principles. This Court should disapprove of WPIC 4.23 as inconsistent with art. 1, § 21, and find constitutional error.

(d). Reversal is required for structural, or non-harmless error.

i. Structural error. Unanimity error in alternative means cases should be considered structural error. Such error goes to the core of the Due Process right to a fair trial.[2]

Certainly, affirmatively telling the jury it need not be unanimous is certainly structural error. Structural error is automatically reversible constitutional error wherein no amount of inquiry into the record for application of a harmlessness standard can possibly be assessed to remedy the deficiency or result, under Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

The requirement of a unanimous jury is part and parcel of the requirement of proof to a jury, beyond a reasonable doubt, of every fact required for conviction. State v. Franco, 95 Wn.2d at 830 and n. 1 (Utter, J., dissenting) (citing State v. Stephens, 93 Wn.2d 186, 607 P.2d

[2] U.S. Const. amend. 14 provides in part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

304 (1980) and In re Winship, supra); Const. art. 1, § 21; U.S. Const. amend. 14. In general, improperly instructing the jury on the proof beyond a reasonable doubt standard in a way that reduces that burden is structural error. U.S. Const. amend. 14; Sullivan v. Louisiana, 508 U.S. at 281–82. Thus, in Sullivan, structural error occurred where the jury was given an erroneous definition that required the jury to have "grave uncertainty" in order to find reasonable doubt. Sullivan v. Louisiana, 508 U.S. at 281–82. And in Miller v. State, 298 Kan. 921, 923, 935, 318 P.3d 155 (2014), structural error resulted, when the jury was told that there must be reasonable doubt as to "each" element in order to acquit. This erroneous statement was per se prejudicial because it endorsed issuance of a guilty verdict despite reasonable doubt on an element. Miller v. State, 298 Kan. at 923, 935. See also State v. Smith, 174 Wn. App. 359, 363, 368-69, 298 P.3d 785 (2013) (jury instructed it "should" acquit if it had a reasonable doubt).

Here, where instruction 11 affirmatively told the jury it need *not* be unanimous as to the means, this was structural error requiring reversal without resort to harmless error analysis. No amount of inspection of the record could possibly determine that the jury, given that instruction, was unanimous nonetheless. Indeed, if juries follow

the instructions of the court, one can assume the jury in this case likely did exactly what the trial prosecutor urged it to do.

ii. Not harmless beyond a reasonable doubt. Alternatively, unanimity error should be required to be harmless beyond a reasonable doubt by virtue of overwhelming *uncontroverted* evidence on both means in order to affirm, the same as Chapman's application in Petrich cases. State v. Kitchen, 110 Wn.2d 403, 405-06, 411–12, 756 P.2d 105 (1988) (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) (and clarifying standard of State v. Petrich).

Petrich unanimity error, which is just as equally a denial of the art. 1, § 21 right to a unanimous verdict, will be deemed harmless only if there was no controverting or conflicting evidence on any of the factual instances, i.e., if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. Kitchen, at 405-06; see, e.g., State v. Coleman, 159 Wn.2d 509, 150 P.3d 1126 (2007). Applied to alternative means cases, the harmless error rule would be identical to the same rule in Petrich multiple acts cases. See Franco, 96 Wn.2d at 836-37 (Utter, J., dissenting) (citing Chapman). This Court should reverse because the unanimity error was not harmless.

2. **Mr. Armstrong's right to Due Process under the Fourteenth Amendment was violated pursuant to Arizona v. Youngblood where the police, in bad faith, failed to collect the AM/PM video evidence that the officers knew was potentially exculpatory.**

a. The police employed the AM/PM video to try and get Mr. Armstrong to confess, but then never secured it after being done using it for *their* purposes.

Mr. Armstrong was arrested by Seattle police and questioned on the street, near the AM/PM. 7/29/14RP at 74. The police officers told Armstrong that he needed to tell the truth, or the videotape from the AM/PM would be obtained, or had been obtained. 7/29/14RP at 78-80 and 7/30/14RP at 30-33. The officers repeatedly implied that the video was being held or would be secured:

Time Point	Police Statement
12:45	"We got the whole incident on video"
12:53	"We got you on video"
13:33	"tell the truth, like I say, we got the whole thing on video"
13:40	"If you tell me a lie and I go look at the video, I'm going to take it personally"

Police Car Recording - State's Exhibit 3, track 7674@20140420232558

At trial, Mr. Armstrong's *pro se* complaints about the absence of the promised AM/PM videotape were mostly ignored. 7/30/14RP at 7-8. However, the prosecutor ultimately stated that Todd Hawkins, the AM/PM store clerk who would later testify, had told the State, that

morning, that the video footage had been recorded over or recycled, in the normal course. 7/30/14RP at 9.

Before that recording-over, there had been an AM/PM video. 7/30/14RP at 35 to 53. In Todd Hawkins' trial testimony later that day, he testified, "I do know that video surveillance was taken of the whole incident because I reviewed it myself right after the incident." 7/30/14RP at 45. Although Hawkins was most concerned with the footage from inside the AM/PM, he indicated that one of the store's 16 video cameras had recorded an angle that showed the street outside, including part of the bus stop. 7/30/14RP at 47-48. This included "a slight view, low view shot, of maybe the bus stop, a small piece of the sidewalk. But that's it." 7/30/14RP at 47.

Hawkins testified that the Seattle police and the Seattle Fire Department routinely obtained video footage from this AM/PM store's surveillance cameras, and had done so in previous incidents. 7/30/14RP at 50-52. Officers had even viewed footage at the store, in the upstairs, second-floor room where the video equipment was contained. 7/30/14RP at 51.

Additionally, Hawkins stated that he had made the video footage known. On the day in question, April 20, Seattle police officers had

come into the AM/PM investigating the incident. 7/30/14RP at 43-44. At some juncture, Hawkins reported that there was video footage, stating, "The only piece of information that I volunteered concerning the video is, yes, AM/PM have a video monitoring system. And the incident is recorded on camera. And AM/PM or Convenience Store Management, Incorporated should have that video, as well as the written report that I have documented and gave to them [on April 21]." 7/30/14RP at 52.

b. A videotape of the alleged crime scene, even a partial view of the Metro bus stop, is potentially exculpatory.

"Potentially useful" evidence is evidentiary material that could have been examined, the results of which might have exonerated the defendant. Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). If such evidence is lost or destroyed by the State, the defendant's right to Due Process is violated, if the police acted in "bad faith." Youngblood, 488 U.S. at 57-58, State v. Wittenbarger, 124 Wn.2d 467, 474-77, 477, 880 P.2d 517 (1994).

In this case, videotape of the area of the Metro bus stop, where the supposed altercation and assault was claimed to have occurred, was potentially exculpatory evidence because it would have depicted what

occurred – i.e., nothing. Videotape evidence of a crime scene is "potentially exculpatory" evidence. United States v. Zaragoza-Moreira, 780 F.3d 971, 978-79 (9th Cir. 2015) (video of scene of alleged border/drugs violation was potentially exculpatory); People v. Alvarez, 229 Cal. App. 4th 761, 774-75, 176 Cal. Rptr. 3d 890 (2014) (video of parking lot at time of robbery was potentially exculpatory).

c. After threatening Mr. Armstrong that the AM/PM security video would "go to court" if he did not confess, police officers failed to collect and preserve that video, in totality acting in "bad faith."

If the State fails to preserve "potentially useful" evidence – evidence that does not rise to the high level of material and exculpatory per California v. Trombetta, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the State can still be in violation of Due Process. U.S. Const. amend. 14;[3] State v. Wittenbarger, 124 Wn.2d at 474-77. The loss of this sort of evidence, which "might have exonerated" the accused, will make out a Due Process violation if "the defendant shows bad faith on the part of the police." State v. Copeland, 130 Wn.2d 244, 279-80, 922 P.2d 1304 (1996) (citing Wittenbarger, 124 Wn.2d at 475; and Youngblood, 488 U.S. at 58).

[3] U.S. Const. amend. 14, § 1 ("... nor shall any State deprive any person of life, liberty, or property, without due process of law ....").

Bad faith is plainly shown where the State makes false assurances regarding the securement of evidence. For example, in the case of United States v. Cooper, 983 F.2d 928 (9th Cir. 1993), the defense hoped to examine seized laboratory equipment in order to determine if it was physically capable of manufacturing methamphetamine, as charged. The government repeatedly implied to the defense that the equipment was being held, even though agents knew it would likely be destroyed in the normal course per environmental regulations. United States v. Cooper, 983 F.2d at 930. Pursuant to Youngblood, the Court ruled that the multiple statements by the DEA agents to the defendant that the equipment was "being held as evidence," showed bad faith in combination with allowing the equipment to be destroyed despite making these assurances. United States v. Cooper, 983 F.2d at 930-31.

In general, bad faith can be shown by knowledge of the attendant circumstance of the required exculpatory nature of the evidence under either Trombetta, or the Youngblood standard, or by wrongful intent or animus on the part of the police. See Norman C. Bay, Old blood, bad blood, and Youngblood: Due Process, lost evidence, and the limits of bad faith, 86 Wash. U. L. Rev. 241, 289-91 (2008). Thus in a

case of potentially exculpatory evidence, bad faith is strongly indicated by the police knowledge of the potentially exculpatory nature of the evidence at the time it was lost. Cooper, supra, 983 F.2d at 931 (finding bad faith where agents were aware when they allowed its destruction that the evidence might exonerate the defendant).

d. In the totality of the circumstances, a failure to collect known evidence can certainly be bad faith.

There is no general, enforceable police duty to ferret out evidence. However, in the appropriate circumstances, a bad faith failure to collect potentially exculpatory evidence can violate the Due Process clause. Miller v. Vasquez, 868 F.2d 1116, 1120-21 (9th Cir.1989) (Due Process requires law enforcement not just to preserve evidence but to collect evidence in "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.").

Here, Mr. Armstrong was arrested on the spot, and taken into custody. In comparison, the AM/PM store clerk made clear that the police had obtained videotape footage from that store in the past. And in this instance, the officers departed the scene without requesting the video footage, after stating it would be collected. The failure to collect

the video was bad faith attributable to the police. Miller v. Vasquez, 868 F.2d at 1120-21 (issue was waived, but facts colorably showed bad faith where investigating officer was told of victim's blood-stained jacket, but failed to collect it, despite mentioning jacket during interview at police station).

In this far more egregious case, by failing to collect the video, after telling Mr. Armstrong, again and again, that it had been obtained, or would be, in order to try to extract incriminating statements from him, the State must be held to the bad faith standard. See Wittenbarger, 124 Wn.2d at 475–77 (improper motivation of law enforcement is pertinent to bad faith). The police acted in this case with an extreme cavalier attitude toward the preservation of known potentially useful evidence. The officers also told Mr. Armstrong:

Time Point	Police Statement
13:03	"Either you tell us what happened, or we pull the video and it goes to court"

State's Exhibit 3, track 7674@20140420232558 (police car recording).

Despite all of this conduct by the officers, elaborately touting the centrality of the AM/PM video to Mr. Armstrong during his arrest, it appears that in addition to not collecting the evidence, no officer even made the evidence known. Detective Rande Christiansen, during his

testimony introducing Mr. Armstrong's two prior NCO offenses, stated that he was assigned by SPD several days after the incident to review the "go report," or narrative report of police of the incident, but he did not investigate whether there were any surveillance videos from the AM/PM -- because "I didn't know they existed." 7/30/14RP at 86-87.

Of course, following usual police procedures is probative of police good faith, which defeats a Youngblood claim. State v. Ortiz, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992). Likewise, failing to act per evidence collection policies or reasonable common sense assessments of evidence any officer should be expected to make, equating to recklessness, was deemed probative of bad faith in a case. United States v. Elliott, 83 F.Supp.2d 637, 645-47 (E.D.Va.1999).

Here, Officer Quindelia Martin was designated as the primary responding officer to lead up the investigation, for training purposes because Martin was new to the SPD. It was Martin's duty to delegate responsibilities to other officers who arrived on the scene. 7/30/14RP at 58-61. Officer Martin heard Officer Elliott, who had worked that general area for a long time, raise the topic of an AM/PM surveillance video with Mr. Armstrong, but the officer did not personally investigate it because "I assumed it was the responsibility of someone else at the

scene." 7/30/14RP at 72-73, 75. Officer Martin later wrote up her own report and submitted it to SPD. 7/30/14RP at 74, 76.

Officer Rodrigué was part of the team responding to the incident, and he was one of multiple officers who told Mr. Armstrong there was an AM/PM video that was obtained or would be and would go to court. 7/29/14RP at 78-80; 7/30/14RP at 30-33; Exhibit 3. Rodrigué believed that this particular AM/PM store had security video because he had responded to the business before. 7/30/14RP at 33. But he did not seek out any videotape on this occasion, because, he said, he was not the primary officer – either Officer Martin and/or Officer Elliott were.[4] 7/29/14RP at 80; 7/30/14RP at 33-34. He did complete or ensure submission of paperwork reporting the arrest. 7/30/14RP at 25.

The police officers in this case not only disregarded any obligation to do what they had repeatedly told Mr. Armstrong they had done or were going to do, but also failed to do what the officers individually and amongst themselves determined would be their practice in this specific case. Bad faith will not be found where police

[4] The prosecutor stated that Officer Elliott had child care issues and rested without calling him. 7/30/14RP at 79, 82, 99.

handled later-spoiled samples in "the usual manner." State v. Ortiz, 119 Wn.2d at 303-04. But it cannot be the "usual manner" to have in mind a plan to collect evidence at the scene of arrest, and then abandon that plan, after using it to force cooperation. And a failure to follow established procedures is probative evidence of bad faith. United States v. Deaner, 1 F.3d 192, 200 (3rd Cir. 1993). Here, the officers at the arrest scene told Mr. Armstrong the video was obtained, or would be, and that it would go to court, and they also had some procedure determined amongst them to collect the evidence. Then, they completely disregarded all of that, after their threats were unsuccessful in extracting the desired confession from Mr. Armstrong.

e. The loss of the potentially useful evidence was a Due Process violation and reversal is required.

Videotape of the area of the Metro bus stop was potentially exculpatory evidence because it would have depicted that there was no assault. Ms. Karavan claimed that Mr. Armstrong yelled, acted drunk, then punched her twice. See 7/29/14RP at pp. 39-43, 40-45. The AM/PM video footage depicting the bus stop right in front of the convenience store would show that none of this happened, as per Mr. Armstrong's defense. Karavan claimed that Mr. Armstrong, in addition

to hitting her twice, also tried to get her wallet out of her jacket, and threw her jacket on the ground. 7/29/14RP at 44-45. Ms. Karavan also claimed that Mr. Armstrong was pounding the plexiglass wall of the bus stop so hard, that he "almost broke it." 7/29/14RP at 42. She claimed that she had to grab her jacket from off the ground, and then ran, fleeing, from the bus shelter toward and into the AM/PM. 7/29/14RP at 45-46. The low video angle showing the bus stop in front of the store would have proved that none of this happened. Videotape evidence of a crime scene shows what occurred. It is "potentially exculpatory" evidence. Zaragoza-Moreira, 780 F.3d at 978-79; Alvarez, 229 Cal. App. 4th at 774-75. Due Process requires reversal and dismissal. Cooper, supra, at 932; U.S. Const. amend. 14.

V. CONCLUSION

Based on the foregoing, this Court should reverse Dennis Armstrong's conviction and dismiss the charge.

Respectfully submitted this 25TH day of October, 2016

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 93119-4
v.	)	
	)	
DENNIS ARMSTRONG,	)	
	)	
Petitioner.	)	

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