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SUPREME COURT NO. _____

Case #: 1043104

NO. 59378-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RODNEY YEAGER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Marilyn Haan, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Rodney Yeager, the appellant below, seeks review of the court of appeals' unpublished decision in State v. Yeager, No. 59378-5-II (attached as an appendix)

B. ISSUE PRESENTED FOR REVIEW

The accused is denied due process under both the federal constitution and our state constitution when the government destroys potentially exculpatory evidence in bad faith. Bad faith hinges on the government's knowledge of the apparent exculpatory value of the evidence at the time that the evidence is destroyed. But this Court has never opined on whether the government's knowledge should be viewed objectively, based on the facts and circumstances known to the relevant government actor, or subjectively, based on the government actor's intent or beliefs. Is review warranted under RAP 13.4(b)(3) and (4) to determine whether this inquiry is subjective or objective?

C. STATEMENT OF THE CASE

On June 18, 2022, Mr. Yeager woke up in a Cowlitz County jail cell with no memory of how he had arrived there. RP 223. The previous night, he had been arrested while he was so drunk that he was "blacked out." RP 224. The jail guards had been informed by the police that brought Mr. Yeager in that he was intoxicated. RP 195. And he behaved himself like someone "extremely intoxicated." RP 196. He was "obnoxious" and "uncooperative." RP 214.

Because Mr. Yeager was so intoxicated, he was placed in a holding cell in the booking area of the jail. RP 187-89. The holding cell is a closed room with cement walls. RP 191. The door of the holding cell is made of solid steel with a plexiglass window. RP 195. Alone in the holding cell, Mr. Yeager continued to be "argumentative." RP 190. Two Cowlitz County Jail employees, Officers Andrew Caldwell and Jeff Bergman, were in the booking area on the other side of the door. Mr. Yeager told them he wanted to be let out of jail and said he wanted to make a phone call. RP

190. When he was told he could not make a phone call, he made a series of remarks and gestures that would become the basis for this case. RP 196-97.

According to the officers, Mr. Yeager said to Officer Caldwell: "Wait till I find out where you live, I'll f[]ing shoot you." RP 191. Officer Bergman, the more experienced of the two, responded to this remark by attempting to calm Mr. Yeager down. RP 192. Officer Bergman told Mr. Yeager he "really [didn't] want to take it there" because "taking it there is picking up a new charge." RP 215. According to Officer Bergman, Mr. Yeager continued to make similar statements, accompanied by a "slashing" gesture. RP 216. Mr. Yeager repeated these remarks until Officer Bergman determined he had "had enough." RP 216. Officer Bergman then reported the incident to the Cowlitz County Sheriff's Office. RP 217.

Deputy Kenneth Rago of the Cowlitz County Sheriff's Department responded to Officer Bergman's call and arrived at the jail. RP 200. When Deputy Rago arrived, Mr. Yeager was still

yelling, asking to be let out, and banging on the door. RP 202. To Deputy Rago, Mr. Yeager reportedly said, "F[] you, I'll beat your ass even with your badge on." RP 203. Eventually, Mr. Yeager fell asleep in the holding cell. RP 196.

On June 23, 2023, Mr. Yeager was charged with four counts of felony harassment based on the remarks he had made to the jail employees and to Deputy Rago. CP 4-7. One count was based on a threat to kill to Officer Caldwell. The other three counts were based on threats to Officer Caldwell, Officer Bergman, and Deputy Rago based on their status as criminal justice participants acting in their official capacity. CP 4-7.

Mr. Yeager has no memory of these events. RP 223. Through counsel, he promptly requested discovery, including any video of the incident. RP 72; CP 23, CP 28 (FF 3).

The Cowlitz County Jail has multiple surveillance cameras in the booking area. RP 193; CP 28 (FF 2). One camera was in the holding cell where Mr. Yeager was. RP 57, 217. There were also cameras in the part of the booking area where the officers were.

RP 48. The surveillance cameras do not record sound, but they do record video. RP 218; CP 28 (FF 2). Cowlitz County Jail has a policy to preserve video related to any incident through the exhaustion the appeal process related to that incident. RP 51. If there is no incident, video is deleted after 60 days. RP 50; CP 26. Officer Bergman and Officer Caldwell each filled out a "Jail Incident Report." CP 62-64. Officer Bergman's incident report included reference to the alleged "slashing motion," as well as other alleged physical movements—Mr. Yeager "pounding on the door," pointing his finger in [Officer Bergman's] face" and "making his eyes bigger than normal" with his "face pressed up against the glass." CP 64.

On June 23, 2022—the same day that it filed the charges against Mr. Yeager, the Cowlitz County Prosecutor's office requested copies of the video. RP 204-05. Specifically, it directed Deputy Rago—who was both the investigating officer and one of the complaining witnesses in the case—to obtain the jail video. RP 204; CP 33. But Deputy Rago did not do so for two months. RP

52. In August 2022, Deputy Rago reported to the prosecutor's office that the video had been deleted. CP 35; RP 203-204. In October 2022, defense counsel reached out to the jail directly to attempt to obtain the video and was told that the video was gone. RP 49.

Mr. Yeager moved to dismiss based on CrR 8.3(b), arguing that governmental misconduct had denied him due process when the video was deleted despite both (1) the jail's own policy, requiring it to preserve the video, and (2) his timely discovery request. CP 11-15. At the time of this motion, Mr. Yeager was not yet aware that the prosecutor's office had instructed Deputy Rago to obtain the video before it had been destroyed. RP 101.

The trial court denied the motion, explaining that although it "does not like that the video was destroyed given there was an incident," it did not find that the destruction of the video was done in bad faith. RP 86; CP 27-29. The court also found that because the video did not include audio, it was merely potentially useful evidence rather than material exculpatory evidence. CP 28 (CL 1).

Upon learning that the prosecutor's office had requested that Deputy Rago obtain the video, Mr. Yeager renewed his motion to dismiss, arguing that Deputy Rago's failure to do so showed bad faith. RP 107-108; CP 30-59. The trial court once again denied the motion. RP 108-109. Mr. Yeager was convicted on four counts of harassment. CP 96-99. At sentencing, the court expressed its opinion that Mr. Yeager's remarks were "just drunkenness" and the officers had likely pursued the charges as a "next step in [] managing [Mr. Yeager's] behavior" rather than because they were "really all that afraid of [Mr. Yeager.]" RP 314

On appeal, Mr. Yeager argued that the destroyed video evidence constituted a denial of due process requiring reversal and dismissal with prejudice. Br. of Appellant, 13-28. Mr. Yeager also argued that under Counterman v. Colorado, 600 U.S. 66 (2023), the jury instructions violated his First Amendment

rights. Br. of Appellant, 40-45.[1]

The court of appeals agreed that the Counterman error required reversal and remanded Mr. Yeager's convictions for a new trial. Slip op., 2. But the court of appeals declined to dismiss Mr. Yeager's convictions with prejudice because he was denied due process based on the destroyed video evidence. Slip op., 9-10. The court of appeals concluded that neither any jail employee nor Deputy Rago had acted in bad faith, based on the jail captain's testimony that he believed the video was not important since it did not capture audio, and "the crux of the harassment charges was what [Mr.] Yeager *said* to the officers and not what he *did*." Slip op., 7-10 (emphasis in original).

Mr. Yeager now seeks this Court's review of the destruction of evidence issue.

[1] Mr. Yeager also argued that a missing evidence instruction should have been given. Br. of Appellant, 29-39. The court of appeals did not reach this issue. Slip op. 2, n.1

D. ARGUMENT IN SUPPORT OF REVIEW

This Court should grant review to clarify whether the government's bad faith in destroying potentially exculpatory evidence is determined by the government's objective or subjective knowledge of the potential exculpatory value

The Due Process Clause of the Fifth Amendment requires that a person accused of a crime be afforded a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. 479, 485 (1984). Article I, section 3 of the Washington Constitution requires the same. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). To protect that right, the government has an obligation to disclose material exculpatory evidence—and a related duty to preserve it. Id. at 475. When the government fails to meet that obligation, dismissal with prejudice is required. State v. Burden, 104 Wn. App. 507, 511, 17 P.3d 1211 (2001).

However, in Arizona v. Youngblood, the Supreme Court of the United States held that when the evidence that is merely *potentially* exculpatory is destroyed by the government before its

contents is known, due process only requires dismissal when the government has acted in bad faith. 488 U.S. 51, 57 (1988). In Wittenbarger, this Court held that our State Constitution's due process clause requires the same. 124 Wn.2d at 474.

The meaning of "bad faith" has lacked clarity since the test's inception. As Justice Blackmun asked in dissent,

> What constitutes bad faith for these purposes? Does a defendant have to show actual malice, or would recklessness, or the deliberate failure to establish standards for maintaining and preserving evidence, be sufficient? Does "good faith police work" require a certain minimum of diligence, or will a lazy officer, who does not walk the few extra steps to the evidence refrigerator, be considered to be acting in good faith?

Youngblood, 488 U.S. at 66 (Blackmun, J., dissenting).

In the decades since, courts have "formulated an assortment of definitions" of bad faith. See Norman C. Bay, Old Blood, Bad Blood and Young Blood: Due Process, Lost Evidence, and the Limits of Bad Faith, 86 WASH. U. L. REV. 241, 289-90(2008) (noting several different definitions of bad faith used in different jurisdictions). One notable example is the Tenth

Circuit, which has developed a five-factor test to determine whether the government acted in bad faith. See United States v. Bohl, 25 F.3d 904, 911- (10th Cir. 1994)(considering (1) whether the government received "explicit notice" that the defendant believed the evidence was exculpatory; (2) whether the defendant's belief that the evidence is potentially exculpatory is "conclusory, or instead 'backed up with objective, independent evidence giving the government reason to believe that further tests of the [destroyed evidence] might lead to exculpatory evidence;'" (3) whether the defendant put the government on notice at a time when the government could still "control the disposition of the evidence;" (4) whether the evidence "was central to the case;" and (5) whether the "government offers any innocent explanation for its disposal of the evidence.").

But for the most part, "[b]ad faith is a notoriously imprecise, amorphous standard." Evan S. Glaser, Youngblood in Practice: How The Bad Faith Standard Preserves Wrongful Convictions and Creates Perverse Incentives, 75 RUTGERS L.

REV. 1037, 1335 (2023). In Washington, Justice Blackmun's questions have remained unanswered.

"Consistent with the Ninth Circuit's application of the Youngblood bad faith standard," this Court has held that the meaning of "bad faith" in this context turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. State v. Armstrong, 188 Wn.2d 333, 345-46, 394 P.3d 373 (2017). See United States v. Zaragoza-Moreira, 780 F.3d 971, 977 (9th Cir. 2015)(same).

But this Court has never explained how the government's knowledge—and therefore, its bad faith—should be determined. In particular, whether it is an objective inquiry based on the facts known to investigating officers at the time, or a one based on an officer's subjective beliefs. See e.g. United States v. Westerdahl, 945 F.2d 1083, 1087 (9th Cir. 1991)(not deciding "whether the appropriate standard under Youngblood is objective or subjective[.]"); United States v. Vera, 231 F. Supp.2d 997, 1000 n. 2 (D. Or. 2001) ("Whether bad faith is assessed against an

objective or subjective standard remains an open question.").

The Ninth Circuit seemingly applied an objective standard in Zaragoza-Moriera, 780 F.3d at 971, a case with analogous facts to this one. Estefani Zaragoza-Moreira was discovered carrying packages of heroin and methamphetamines on her body in the pedestrian line for admission into the United States from Mexico on December 22, 2011. Id. at 974. In a post-arrest interview, Ms. Zaragoza-Moriera informed an agent that she had been coerced into transporting the substances, and that she had attempted to attract the attention of the authorities in line by making noises, "wiggl[ing] around," patting her stomach, and throwing her passport to the ground. Id. at 975-76. The following day, Ms. Zaragoza-Moriera was charged with importing heroin and methamphetamine into the United States. Id. at 975.

On December 28, 2011, Ms. Zaragoza-Moriera's attorney sent a letter to the prosecutor assigned to the case requesting that "any and all videotapes" be preserved. Id. at 976. In February 2012, Ms. Zaragoza-Moriera's attorney filed a motion to compel

discovery, referencing the videotape, and the court ordered the government to preserve the evidence. Id. at 976-77. When the prosecutor, attempting to comply with the court order, requested the video however, U.S. Customs and Border Protection informed the prosecutor that the video had been destroyed in late January, when it had been automatically recorded over. Id. at 977.

Ms. Zaragoza-Moriera moved to dismiss. Id. at 977. The trial court denied the motion, finding that although the video was potentially useful to her defense, its destruction was not in bad faith because its value was not "readily apparent" to the border patrol agent tasked with investigating the case. Id. at 978.

The Ninth Circuit reversed, explaining that because Ms. Zaragoza-Moriera had described her actions in line in her initial interview—which could support a duress defense—the border patrol agent was necessarily aware that the pedestrian line footage was potentially useful evidence. Id. at 979-980. Despite the agent's testimony that she had simply "overlooked" retrieving

the footage and that it was "just something [she] didn't think about doing," the Ninth Circuit held that because the agent was aware that the footage existed and could theoretically support a defense, her failure to review or preserve the video was bad faith destruction of evidence. Id.

In contrast here, without citation to authority or explanation for doing so, the court of appeals appears to have applied a *subjective* knowledge inquiry, noting that "the jail captain testified that he "did not believe the video constituted an incident because it did not include audio" and thus failed to preserve it, and reasoning that the officer charged with obtaining the video did not act in bad faith because "the crux of the harassment charges was what Yeager *said* to the officers, and not what he *did*." Op. at 9-10. (emphasis in original).

In so doing, the court of appeals ignored the multiple *objective* reasons that the government should have known that the video had potential exculpatory value, including that (1) Mr. Yeager had made a timely discovery request for the video; (2) the

prosecutor's office had instructed Deputy Rago to obtain the video and there is no explanation in the record for his failure to do so in a timely way; (3) multiple jail employees wrote official "Jail Incident Reports," indicating that the jail's incident preservation policy should have been triggered; and (4) Deputy Rago's review of the incident reports necessarily alerted him that physical gestures had been alleged.

The court of appeals distinguished Zaragoza-Moreira in two ways. First, it noted that Ms. Zaragoza-Moreira claimed that she had engaged in physical actions such as wiggling around and patting her stomach, whereas Mr. Yeager's criminal conduct was verbal threats, and reasoned that it was therefore not apparent to the jail that Mr. Yeager's body language or facial expressions would be helpful to the defense. Slip op. at 9. Second, it noted that the border patrol agent who failed to preserve the video knew the video was important to Ms. Zaragoza-Moreira's defense. Id.

But when applying an objective standard to the facts in this case, these distinctions vanish. The Zaragoza-Moreira court

held that "strength of [the duress defense] and whether [the border patrol agent] believed the claim do not diminish the potential usefulness of the video." 780 F.3d at 979. The agent's "knowledge" of the video's usefulness was based on her knowledge of the objective facts that (1) duress is a possible defense; (2) Ms. Zaragoza-Moreira claimed to have been under duress (3) there was video could footage that might or might not support her claim. Id. at 980.

Here, applying the same objective logic, Deputy Rago knew the video could be useful to Mr. Yeager's defense. To prove the crime charged—felony harassment, the government was required to prove both that Mr. Yeager's remarks were serious threats, rather than words "said in jest, idle talk, or political argument." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (citing United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1984)). It was also required to prove that the officers were placed in reasonable fear that the threat would be carried out. RCW 9A.46.020; State v. C.G. 150 Wn.2d 604, 609, 80 P.3d

594 (2003). What Mr. Yeager looked like while he was making the alleged threats, and what the jail guards looked like when they responded could therefore serve as the basis of a defense—denial. If Mr. Yeager did not appear serious, or if the guards did not appear frightened, that would be evidence that no crime had occurred, regardless of what Mr. Yeager said. Further, Deputy Rago necessarily knew the video existed and was important because he had been instructed to retrieve it. Under an objective standard, the government knew the video constituted potential exculpatory evidence and destroyed it in bad faith.

An objective standard is consistent with other constitutional inquiries used by courts to regulate law enforcement's behavior based on their knowledge. For example, courts determine the validity of a Terry [2] stop based on based on "an objective view of the known facts, not the officer's subjective belief or ability to correctly articulate his suspicion in reference to

[2] Terry v. Ohio, 392 U.S. 1 (1968)

a particular crime." State v. Pines, 17 Wn. App. 2d 483, 491, 487 P.3d 196 (2021); State v. Day, 161 Wn.2d 889, 896 168 P.3d 1265 (2007). Similarly, determining whether there is probable cause for an arrest relies on an objective consideration of "facts and circumstances" known to a police officer. State v. Gaddy, 152 Wn. 2d 64, 70, 93 P.3d 872 (2004). Whether a person has been seized is determined by looking objectively at a police officer's behaviors—the "subjective intent of police is irrelevant" except when it is communicated to the accused. State v. Sum, 199 Wn.2d 627, 636, 511 P.3d 92 (2022). And an objective standard is consistent with the view of the Supreme Court of the United States, that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Kentucky v. King, 563 U.S. 452, 464 (2011) (internal quotations omitted).

Clarifying that knowledge is an objective inquiry would also ameliorate the most significant criticisms of the Youngblood

bad faith standard—that it is a poorly defined standard, that it is a nearly impossible standard for defendants to prove, and that it creates perverse incentives for law enforcement, who stand to gain by destroying evidence before its exculpatory value is known. See Glasner, supra, 1317, 35. If bad faith can be proved by objective facts known to the government, there is less of a risk that of "cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." Youngblood, 488 U.S. at 61.

Without guidance about whether the government's knowledge that defines "bad faith" is an objective or subjective standard, courts will continue to reach very different conclusions when faced with similar facts. And as long as it can be viewed subjectively, the accused will continue to suffer without remedy whenever the police destroy evidence before its value can be determined, unless the government admits wrongdoing. This Court's review is needed to clarify how courts should determine

the government's knowledge in destruction of evidence cases. RAP 13.4(b)(3)(4).

E. CONCLUSION

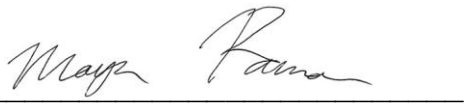
For the reasons discussed above, this Court should grant review on the destruction of evidence issue and reverse the court of appeals.

DATED 20th day of June, 2025.

I certify this document contains 3,562 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RODNEY JOSEPH YEAGER, Appellant.	No.59378-5-II UNPUBLISHED OPINION

MAXA, P.J. – Rodney Yeager appeals his convictions of four counts of felony harassment. After his arrest for an unrelated incident, Yeager was brought to the Cowlitz County jail. Yeager was intoxicated and uncooperative, and officers placed him in a holding cell. Yeager then threatened the jail officers as well as an investigating deputy sheriff. Yeager had no memory of the incident because of his intoxication.

The jail had security cameras in the holding area that recorded video but no audio. However, the jail destroyed the video of the incident after 60 days without producing it to either the State or Yeager. Yeager filed a motion to dismiss all charges under CrR 8.3(b), which the trial court denied. At trial, the jury was instructed on the definition of "threat" based on existing Washington law that subsequently was rendered erroneous by the United States Supreme Court in *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023).

We hold that (1) although the surveillance video was potentially useful to the defense, the trial court did not err in finding that the video was not destroyed in bad faith; and (2) the trial court's harassment jury instructions were rendered erroneous by *Counterman* and the error was not harmless beyond a reasonable doubt.[1]

Accordingly, we reverse Yeager's harassment convictions and remand for a new trial.

FACTS

Background

Around 2:00 AM on June 18, 2022, Yeager was brought to the Cowlitz County jail. Officers Andrew Caldwell and Jeff Bergman placed Yeager in a holding cell in the booking area of the jail because he was intoxicated and he had threatened them.

Yeager asked to make a phone call from the holding cell and the officers refused. Yeager then said to Caldwell, "Wait till I find where you live, I'll f***ing shoot you." Report of Proceedings (RP) at 191. Yeager banged on the door inside the holding cell. Yeager later told Bergman, "I'll get some druggies and I'll get some people, we'll go to your house, and then we'll see how tough you really are." RP at 216. Yeager also used his finger to make a slashing motion.

Bergman reported the incident to the sheriff's office. Deputy Kenneth Rago responded to the call. Yeager said to Rago, "F*** you," and "I will beat your ass even with your badge on." RP at 202. Yeager said that he would find Rago and beat him up.

Yeager was charged with four counts of felony harassment.

[1] Yeager also argues that the trial court erred in failing to give a missing evidence jury instruction regarding the destroyed security video. Because we are reversing and remanding for a new trial on other grounds, we do not address this argument.

Security Video

The jail had three security cameras in the holding area and one camera in the holding cell where Yeager was placed. The cameras recorded video but not audio.

On June 24, 2022, defense counsel filed a notice of appearance and a request for discovery, including a request for "[a]ny video and audio recordings connected with this case." Clerk's Papers (CP) at 28. In October, defense counsel sent an email to Blaine Lux, the operations captain of the Cowlitz County jail, requesting that video of the June 18 incident be preserved. Lux responded that the video had been destroyed.

Yeager filed a motion to dismiss the harassment charges under CrR 8.3(b) based on destruction of the security camera video. The trial court conducted an evidentiary hearing to address the motion.

Lux testified that the jail's normal retention period for video was 60 days. However, if there is an identified incident, the policy was to retain the video until exhaustion of the appeal process. Lux believed that the 60-day retention period applied in this case because the incident involved only verbal statements that the security cameras did not record.

The trial court denied the motion to dismiss. The court entered the following conclusions of law:

> 1. The security camera video footage was not materially exculpatory evidence. The video footage did not possess an exculpatory value that was apparent before it was destroyed because it did not record sound and thus would not have shown whether the defendant did or did not make the threats alleged.
>
> 2. The security camera video footage could have been potentially useful to the defense.
>
> 3. Neither the jail nor the prosecutor's office acted in bad faith by failing to preserve the security camera video footage beyond sixty days under the circumstances.

> 4. Failure to preserve the security camera video footage does not prejudice defendant's right to a fair trial.

CP at 28.

Defense counsel subsequently learned that on June 23, 2022, the prosecutor's office had sent a request to the Sheriff's office for the security video from the booking area. Deputy Rago attempted to comply with this request on August 27 but was told that the video no longer was unavailable. Based on this new evidence, Yeager renewed his motion to dismiss. The trial court stated that the new evidence did not change its prior ruling or its findings and conclusions, and the court denied the renewed motion.

Jury Trial

At trial in June 2023, Caldwell, Bergman, and Rago testified to the facts stated above. Caldwell testified that Yeager was placed in a holding cell because he was intoxicated. He testified that, once placed in the holding cell, Yeager became argumentative and demanded phone calls, demanded to be let out of jail, and "would not listen or reason with us at all." RP at 190.

Bergman testified that Yeager was placed in the holding cell because "[h]e was quite obnoxious, didn't want to listen uncooperative." RP at 214. During cross-examination, Bergman agreed that Yeager was intoxicated.

Rago testified that when he was trying to give Yeager information while he was in the holding cell, Yeager yelled at him "I don't understand" several times. RP at 202.

Yeager testified that he had no memory of being arrested, being taken to jail, or threatening Caldwell, Bergman, or Rago. He said he had been blacked-out drunk.

The jury instructions stated that, in order to convict, the jury must find that Yeager knowingly threatened Caldwell, Bergman, and Rago. The jury instructions included the following:

> Instruction No. 7: A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

CP at 84.

> Instruction No. 8: Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person. To be a threat, a statement or act must occur in a context or under such circumstances where a *reasonable person*, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP at 85 (emphasis added).

The jury returned guilty verdicts on all four counts. At sentencing, the trial court observed that Yeager's remarks were "just drunkenness." RP at 314.

Yeager appeals his convictions.

ANALYSIS

A. DESTRUCTION OF EVIDENCE

Yeager argues that the State violated his right to present a complete defense when it allowed the video of the incident to be destroyed. He argues that the video could have been useful for his defense and that law enforcement acted in bad faith because it knew the video potentially was significant. We disagree.

1. Legal Principles

Under both the United States and Washington Constitutions, due process in criminal prosecutions requires fundamental fairness and a meaningful opportunity to present a complete

defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). To satisfy due process, the prosecution has a duty to disclose material exculpatory evidence and a related duty to preserve it. *Id*. at 475. The State's failure to preserve evidence that is material and exculpatory violates a defendant's right to due process and requires that the charges against the defendant be dismissed. *Id*.

However, law enforcement does not have " 'an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.' " *State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017) (quoting *Wittenbarger*, 124 Wn.2d at 475). But they are "required to preserve all potentially material and favorable evidence" in their possession. *Armstrong*, 188 Wn.2d at 345.

"To be 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.' " *Id*. (quoting *Wittenbarger*, 124 Wn.2d at 475). On the other hand, the failure to preserve evidence that is only potentially useful does not violate due process "unless the suspect can show bad faith by the State." *Armstrong*, 188 Wn.2d at 345.

The presence or absence of bad faith first depends on " 'the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed.' " *United States v. Sivilla*, 714 F.3d 1168, 1172 (9th Cir. 2013) (quoting *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993)). Second, the defendant must show "that the missing evidence is 'of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' " *Sivilla*, 714 F.3d at 1172 (quoting *California v. Trombetta*, 476 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)).

"Acting in compliance with its established policy regarding the evidence at issue is determinative of the State's good faith." *Armstrong*, 188 Wn.2d at 345.

Claims that the destruction of evidence denied a defendant due process present a mixed question of fact and law. *State v. Davila*, 184 Wn.2d 55, 74, 357 P.3d 636 (2015). We review the trial court's factual findings for substantial evidence and its legal conclusions de novo. *Id*. at 74-77.

2. Analysis

The trial court concluded that (1) the video was not materially exculpatory, but (2) the video was potentially useful to the defense. Yeager does not challenge the first conclusion and agrees with the second conclusion. But he does challenge conclusion of law 3: "Neither the jail nor the prosecutor's office acted in bad faith by failing to preserve the security camera video footage beyond sixty days under the circumstances." CP at 28. The question here is whether law enforcement recognized the apparent exculpatory value of the video at the time it was destroyed and therefore acted in bad faith.

The jail had security cameras that recorded video but not audio. Lux testified that he believed that the normal 60-day retention policy applied to this video because the incident involved verbal statements that the security cameras did not record. Yeager cites no evidence that Lux or anyone at the jail acted in bad faith when they made this decision. Indeed, given that the nature of the incident primarily revolved around Yeager's verbal threats toward the officers and not around his body language or any physical altercation, it was reasonable for Lux to believe that the video would not be useful even though it technically recorded an incident at the jail.

Yeager argues that the jail acted in bad faith because they destroyed the security footage that they knew depicted an alleged crime, despite his request to preserve it and in violation of their written policy requiring its preservation. Yeager analogizes this case to *United States v. Zaragoza-Moreira*, 780 F.3d 971 (9th Cir. 2015). In that case, Zaragoza-Moreira was accused of carrying drugs into the United States from Mexico. *Id*. at 974. After she was arrested, she told a border patrol agent that she had been coerced into transporting the drugs and that she had attempted to attract the attention of authorities by making noises, wiggling around, patting her stomach, and throwing her passport on the ground. *Id*. at 975-76.

Zaragoza-Moreira was charged with importing heroin and methamphetamine into the United States the next day. *Id*. at 976. Her attorney requested "any and all videotapes" be preserved. *Id*. Two months later, her attorney filed a motion to compel discovery referencing the videotape, and the trial court ordered the government to preserve the evidence. *Id*. at 976-77. When the prosecutor requested the video, the United States Customs and Border Protection informed them that the video had been destroyed a month earlier when it was automatically recorded over. *Id*. at 977.

Zaragoza-Moreira moved to dismiss the charges against her, but the trial court denied her motion. *Id*. at 977-78. The court reasoned that the destruction of the video was not in bad faith because its value was not readily apparent to the border patrol agent in charge of the investigation. *Id*. at 978. The Ninth Circuit reversed, explaining that Zaragoza-Moreira had described her actions during her initial interview, so the border patrol agent necessarily was aware that the video footage was potentially useful evidence for her defense. *Id*. at 979-80. The border patrol agent testified that she had overlooked retrieving the footage and that she did not

believe Zaragoza-Moreira's duress defense, but her awareness that the footage existed and could support a defense rendered her failure to preserve the video to be in bad faith. *Id*.

Zaragoza-Moreira is distinguishable. First, the crux of Zaragoza-Moreira's duress defense was her claim that she wiggled around, patted her stomach, and purposefully dropped her passport to get the attention of law enforcement while she was waiting in line to go through customs. *Id*. at 975-76. Those are all physical actions that the video evidence would have captured. In contrast, the conduct at issue in this case was Yeager's verbal threats toward the officers, which would not have been captured on the video recording. Although Yeager speculates that his movements and facial expressions might have been helpful to his defense, this was not apparent to the jail.

Second, the border patrol agent who failed to preserve video evidence in *Zaragoza-Moreira* knew that the video evidence was important to Zaragoza-Moreira's defense. Therefore, she should have known that the video had potentially exculpatory value. In contrast, in this case Lux reasonably assumed that the security video was not relevant to the incident because it did not actually record Yeager's threats since it did not capture audio. There is no indication that Lux knew or even suspected that Yeager's actions as opposed to his words were important to his defense.

Yeager argues that the fact that the prosecutor requested the jail videos and directed Rago to obtain them shows that the State understood that it was an important piece of evidence. He claims that Rago's failure to preserve or review the video before it was destroyed was bad faith because Rago knew that the officers' reports contained allegations that Yeager made a "slashing" motion and pounded on the door. Yeager asserts that the jail was aware that Yeager's conduct would appear on the video and that it therefore had value to the case. Finally, Yeager argues that

the jail failed to follow its own policy regarding the preservation of video because it was required to preserve the video through the appeal process since an incident had occurred.

But we conclude that Rago's failure to preserve the video was not done in bad faith because, as explained above, the crux of the harassment charges was what Yeager *said* to the officers, and not what he *did*. Yeager's assertion that the jail knew the video was valuable to the case is undermined by Lux's testimony that he did not believe the video constituted an incident because it did not include audio. And Yeager's argument that the police acted in bad faith because it did not follow its own policy is incorrect. Lux reasonably believed that he in fact was following jail policy.

We hold that the trial court did not err in concluding that law enforcement did not act in bad faith when it did not preserve the video recording of the incident at the jail. Accordingly, we reject Yeager's argument.

B. "TRUE THREAT" JURY INSTRUCTION

Yeager argues that under *Counterman*, 600 U.S. 66, his harassment convictions must be reversed because the jury instruction defining "threat" stated a reasonable person standard rather than a recklessness standard. He argues that the government cannot show this was harmless error beyond a reasonable doubt. The State concedes that the jury instruction was erroneous, but argues that the error was harmless because sufficient evidence supports his conviction under *Counterman*. We agree with Yeager.

1. Legal Principles

RCW 9A.46.020(1)(a)(i) states that a person is guilty of harassment if they knowingly threaten to cause bodily injury. Because this statute criminalizes pure speech, to avoid violating

the First Amendment Washington courts read RCW 9A.46.020(1)(a)(i) as prohibiting only "true threats." *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013).

Under Washington law existing at the time of trial, a true threat was a " 'statement made in a context or under such circumstances wherein a *reasonable person* would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life' of another person." *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (emphasis added) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001)). A true threat is one that arouses fear in the person threatened, and that fear does not depend on the speaker's intent. *Kilburn*, 151 Wn.2d at 43. Therefore, a statement will be a true threat if a "reasonable speaker would foresee that the threat would be considered serious." *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

After Yeager was convicted but during this appeal, the United States Supreme Court decided *Counterman*, 600 U.S. 66. The Court held that the First Amendment requires that the true threat determination must include a "subjective mental-state requirement." *Id*. at 75. The State must prove the defendant made the threat at least recklessly. *Id*. at 69, 79. Specifically, "[t]he State must show that the defendant consciously disregarded a substantial risk that [their] communications would be viewed as threatening violence." *Id*. at 69. The defendant must be "aware 'that others could regard [their] statements as' threatening violence and 'deliver[ed] them anyway.' " *Id*. at 79 (quoting *Elonis v. United States*, 575 U.S. 723, 746, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (Alito, J., concurring in part and dissenting in part)).

2. Analysis

Yeager argues that jury instruction 8 – which defined a threat – was erroneous under *Counterman*. The State concedes that the jury instruction was erroneous, but argues that the

error was harmless. We agree that instruction 8 was erroneous, but we conclude that the error was not harmless beyond a reasonable doubt.

a. Erroneous Instruction

The trial court instructed the jury that to be a threat,

> [A] statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP at 85.

Although this instruction was correct under the law existing at the time of trial, under *Counterman* the instruction is erroneous. *State v. Calloway*, 31 Wn. App. 2d 405, 421-22, 550 P.3d 77, *review granted*, 3 Wn.3d 1031 (2024). The instruction omitted the constitutional requirement that *Yeager* – not just a reasonable person – " 'consciously disregarded a substantial risk that [their] communications would be viewed as threatening violence.' " *Id*. at 421 (quoting *Counterman*, 600 U.S. at 69).

Accordingly, we agree that jury instruction 8 was erroneous.

b. Harmless Error

We review an error in the harassment jury instructions relating to the true threat requirement under a constitutional harmless error standard. *Calloway*, 31 Wn. App. 3d at 424. We presume prejudice, and the State must prove beyond a reasonable doubt that the error was harmless. *Id*. An error is harmless if we are convinced beyond a reasonable doubt that the jury would have reached the same verdict without the error. *Id*.

Omitting the required mens rea from the jury instructions " 'may be harmless when it is clear that the omission did not contribute to the verdict,' for example, when 'uncontroverted evidence supports the omitted element.' " *Id*. (quoting *Schaler*, 169 Wn.2d at 288). However,

"an 'error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.' " *Calloway*, 31 Wn. App. 2d. at 424 (quoting *Schaler*, 169 Wn.2d at 288).

Here, Caldwell and Bergman testified that Yeager was intoxicated when he made his threats. Yeager testified that he was blacked-out drunk and did not remember making threats to anyone while in jail. The trial court observed at sentencing that Yeager's remarks were "just drunkenness." RP at 314.

The State argues that this case is similar to *Calloway*. In that case, Calloway called and texted the victim nonstop over the course of a day. 31 Wn. App. 2d at 411. Calloway threatened to harm the victim, called her names, and threatened to kill her. *Id*. At one point, Calloway called the victim and said that he was preparing to come to her house to kill her. *Id*. Calloway continued to threaten the victim even after she told him that she had called 911. *Id*. at 411-12.

This court held that the instructional error was harmless beyond a reasonable doubt. *Id*. at 424. The court noted that there was no evidence Calloway was intoxicated or that his state of mind was altered when he made the threats. *Id*. at 25. The court concluded that "no reasonable jury would find that Calloway did not at least consciously disregard a substantial risk that his communications would be viewed as threatening violence." *Id*.

But *Calloway* is distinguishable. There was no evidence that Calloway was intoxicated when he made the threats. *Id*. In contrast, it is undisputed that Yeager was heavily intoxicated when he threatened the officers. And Yeager did not remember making the threats when he woke up in the cell. In other words, is not at all clear that Yeager, in his drunken state, " 'consciously disregarded a substantial risk that [his] communications would be viewed as threatening violence.' " *Calloway*, 31 Wn. App. at 421 (quoting *Counterman*, 600 U.S. at 69).

Accordingly, we hold that the error in jury instruction 8 was not harmless beyond a reasonable doubt.

CONCLUSION

We reverse Yeager's harassment convictions and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

PRICE, J.

CHE, J.

NIELSEN KOCH & GRANNIS PLLC

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