

No. 68915-1-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

KEAYN DUNYA, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court correctly determined that the state's authorization of testing on DNA evidence without prior notice to Dunya did not warrant suppression because the DNA was not material exculpatory evidence, the state did not authorize consumption in bad faith and Dunya was still able to challenge and argue the DNA test procedure and results were unreliable.
2. Whether the trial court acted within its sound discretion admitting testimony of forensic video analyst Officer Schwallie that a suspect caught on video on the night of Kriston's murder appeared to have darker skin tone relative to other persons caught on video surveillance that night and that the suspect, using reverse projection photogrammetry analysis, appeared to be approximately 5'10 tall and carrying what looked like a long barreled gun in video surveillance where such testimony was helpful to the trier of fact in viewing and understanding the infrared video surveillance admitted at trial.
3. Whether the jury verdict supports Dunya's firearm enhancement penalty where the jury found by special verdict Dunya was armed with a firearm at the time he committed his offense and while jury was also instructed that to return the special verdict it had to find beyond a reasonable doubt Dunya was armed with a deadly weapon, inclusive of a firearm, the jury was also further instructed that a firearm is a weapon or devise from which a projectile may be fired by an explosive such as gunpowder.

C. FACTS

1. Procedural facts

Keayn Dunya was charged and subsequently convicted by jury of first degree murder while armed with a deadly weapon. CP 37, 38. Dunya was given a standard range sentence of 320 months plus 60 months on the firearm enhancement for a total of 380 months. CP 6-7.

2. Substantive Facts

On July 5th 2011, Kriston Dunya was found lying in a pool of blood in her Belvedere apartment in Bellingham, by a Barnes and Noble co-worker, Whiskey Robinson. RP 48, 51. Robinson went to Kriston's apartment to check on her after Kriston failed to show up for two consecutive days of work. 5/23/12 RP 48. Robinson found the door to Kriston's apartment unlocked and Kriston in bed clothes, lying in a pool of blood. 5/23/12 RP 51.

Kriston died of blood loss within minutes of one shotgun blast to her chest. 5/23/12 RP 46-48. The gunshot was from such close range, Kriston's face was tattooed with the gun powder soot from the shot. 5/23/12 RP 139, 144. Forensics found a shot gun slug embedded under the carpet near her body and determined the weapon used was likely a 12 gauge shotgun. 5/23/12 106. Scattered around Kriston's body were

Vicodin pills and the tips of a rubber glove. 5/23/12 RP 68. Officer's also found Kriston's purse with her identification and credit cards intact near her body. 5/23/12 RP 68, 79. No prescriptions or bottles consistent the Vicodin pills were found at Kriston's apartment. 5/23/12 RP 79-80. Nor were any weapons or live ammunition found. Id. Additionally, no drugs or alcohol were found in Kriston's system at the time of her death. 5/23/12 RP 152.

An upstairs apartment neighbor, Nancy Parker reported hearing a male voice, a brief scream and a bang bang-she likened to a door slamming, in the early morning of July 4th coming from Kriston's Apartment. 5/23/12 RP 60. Parker reported there was no noise after she heard the Bang-Bang noise. Id. Kriston's friend and co-worker at Barnes and Noble, Amber Wilson confirmed she last worked with Kriston until the store closed at approximately 11:30 p.m.on Saturday July 2nd, 2011. 5/23/12 RP 55. Amber reported that she and Kriston had planned to go on a walk the next day, Sunday July 3rd but Kriston failed to respond to any of her texts Sunday afternoon after Amber got off work. RP 53.

Kriston's attorney confirmed Kriston filed for divorce in 2010 and was formally seeking joint custody and child support for her son Kai from Keayn Dunya. 5/30/12 RP 398. Kriston's friend Amber reported she knew Kriston was seeking custody Kai and that Kriston hoped to someday

move back to Missouri with Kai. 5/23/12 54-57. According to Kriston's attorney, Dunya was frustrated with the dissolution proceedings and objected even after temporary orders were entered, to having to sign any Orders or pay child support. 5/30/12 RP 403-4. Prior to Kriston's death, Dunya and Kriston shared custody pursuant to a temporary parenting plan and Dunya's child support obligation was deviated down to approximately \$20.00 a month. 5/30/12 RP 407. Kriston's attorney reported that because Dunya was not willing to settle the dissolution and enter agreed final orders, she set a July 28th 2011 Dissolution trial date on behalf of her client. 5/30/12 407. At trial, Kriston would obtain a final order of dissolution and corresponding permanent parenting plan and child support order. 5/30/13 RP 407.

Emily Mowry, a former girlfriend of Dunya's testified she dated Dunya from April of 2013 until May of 2011 and that during that time Dunya was worried about his custody dispute with Kriston. 5/30/12 RP 442. At one point she recalled Dunya commented to her Kriston had to die. 5/30/12 RP 442-3. Another woman, Shellie Steven's reported she had met Dunya through Craig's list and had dated him on and off for approximately five years. 5/30/12 RP 369. Dunya told her he was divorced and even after Kriston's death asserted to her via text that he was not married. 5/30/12 374. She reported that in May of 2011, Dunya told

her he was concerned that Kriston would get full custody of Kai and then take him back to Missouri. Id at 370. She also reported that Dunya said something about Kriston needing to die or needing to kill her and that when she hugged him in response and told him he could never to that to Kai because he needs his mother, Dunya hugged her back but then responded quietly, simply stating "I have to." 5/30/12 RP 371.

Following Kriston's death, Dunya reported to police that he was with his child Kai, then seven, and his girlfriend, Kara Buchanan on Whidbey Island during the weekend Kriston was killed. 5/30/12 RP 257. Buchanan and Dunya had been met in August of 2010 but did not start dating intimately until April of 2011. 5/30/12 RP 252-3. Buchanan, like other women in Dunya's life, was under the impression Dunya was divorced. Id.

Buchanan testified at trial that while Dunya and Kai were with her on Whidbey Island on July 3rd 2011 but that she woke up around 3 a.m. and discovered Dunya and her gold Toyota Avalon were gone. 5/30/12 RP 262. At 6 a.m. she observed Dunya was still gone but he had left his own truck and his phone at her house. Id. Buchanan then checked Dunya's phone and discovered he had been corresponding with several other women whilst dating her. Id 263. Up to that point she thought her and Dunya were in a monogamous relationship. Id. Buchanan, upset that

Dunya was gone and in discovering his communications with other women, called her estranged husband and told him she thought her relationship was over. Id at 264.

Soon thereafter Dunya returned and parked her Toyota in the carport –a place it is not normally parked, came in and threw an extra-large red jacket she recognized as hers in the washing machine that Buchanan had already started. 5/30/12 RP 266. Her jacket had a distinctive stripe on the shoulder down the arm and was normally hanging on a hook in the back of her laundry room. Id. Buchanan found Dunya abrupt with her that morning, later taking her upstairs after he returned asking Buchanan if she trusted him and then sodomizing her with a sex toy until they heard Kai up and about. Id at 269.

Dunya instructed Buchanan to stay in the house that morning and she watched as Dunya took a bucket wrapped in clear plastic to the back yard and burned the bucket and whatever items was in it. 5/30/12 RP 270 . Buchanan then again called her estranged husband and said Dunya was acting strange. Id 273. After Dunya and Kai left her home, Buchanan found a piece of hard melted plastic in the burn spot on the grass. 5/30/12 RP 276.

Buchanan later learned Kriston had been killed from detective Leighton who called her when she was driving up to Bellingham on

Tuesday July 5th 2011 to see Kai and Dunya . 5/30/12 RP 280. Buchanan was so upset at the news of Kriston's death, she pulled over to the shoulder of the road and her passenger, a hitchhiker, offered to drive the rest of the way for her. Id. Buchanan was immediately very concerned for the well -being of Dunya's child, Kai and in her mind, no longer was upset about learning Dunya had other women in his life. 5/30/12 RP 280, 288. After spending the next day with Dunya and Kai, law enforcement asked to speak with Buchanan. 5/23/12 RP 284. Dunya made it clear to her prior to her meeting with investigators that she needed to confirm he was with her on Whidbey Island all weekend. Id.

On July 7th however, Buchanan, at the prompting of a friend, eventually questioned Dunya, telling him over the phone that she wanted to fix their relationship, that she would do anything and that she had been worried he was seeing other women but would fix things with him if he told her what he had done. 5/30/12 RP 290. Instead of telling her about an affair as she was expecting, Dunya told her that it was a single shot to the chest and that there was blood splatter all over the apartment. Id. 290. After the phone call ended, Buchanan stunned by Dunya's admission, drove to the beach and left a message for detective Leighton taking responsibility for Kriston's murder and indicating that she was going to kill herself. 5/23/12 RP 84-85, 5/30/12 RP 292. Buchanan explained at

trial that she had told Dunya she would fix it and by that, she meant she was willing to trade her life for Dunya's little boy because she didn't want Kai to grow up without his father. Id at 294. Buchannan explained she used every detail she thought relevant that she previously learned from Dunya and the police to try to convince investigators she was responsible for Kriston's death in her voice mail to investigators. Id. Soon after Buchanan left this voice mail, she was discovered on a beach on Whidbey Island, bleeding profusely. 2/23/12 RP 87. Investigators also found a bottle that had contained Vicodin in her possession. 5/23/12 RP 90. Buchanan later explained she had a Vicodin prescription for chronic pain that she had previously shared some of her medication with Dunya after he told her he had been in a car accident. 5/30/12 RP 286. Buchannan was airlifted to a hospital and en route, confessed that she really did not kill Kriston but was sacrificing herself to ensure Kai had his father. 6/12 RP 514.

At Buchanan's residence, investigators found a box of latex gloves-missing one glove -in the laundry room and a bag of burnt hard plastic debris and in the carport, a gold Toyota Avalon. 5/30/12 RP 286, 5/23/12 RP 93, 94, 95.

Video surveillance obtained from several businesses and entities near Kriston's Belvedere apartments in Bellingham on July 3rd to July 4th

revealed a gold Toyota Avalon that appeared to match the one found in Buchanan's carport driving and parking near Buchanan's apartment in the early morning of July 3rd, 2011. Buchanan's vehicle and the vehicle observed in video surveillance had a right fog light not working, a sunroof, an American flag decal and a broken driver's mirror. 5/23/12 RP100-105.

Forensic video examiner, Officer Schwallie was able to demonstrate, piecing together several of the surveillance video images from the immediate area, that the gold Toyota was driven by Kriston's apartment, around the block and then parked in the Shangri la hotel parking lot in the early hours of July 3rd 2011. Id. Video surveillance also showed a suspect get out of this parked Toyota Avalon at approximately 4:51 a.m., grab a long object that appeared to be a long barrel gun and walk toward Kriston's apartment. 5/23/12 RP 1-68-174, 177. As the suspect walked toward Kriston's apartment, the suspect held the shotgun along the side of his body away from the street. Id 177. Three minutes later, this same suspect returned with the object that looked like a long barreled gun on the other side of his body-again away from the street, got in the Toyota Avalon and drove away. Id 171.

The suspect in the image appeared to be wearing a hooded jacket with distinctive stripes from the shoulder down the on the arms. 5/23/12 RP 171, 179, See also CP ___ (sub nom exhibit 117). A jacket observed

in the video was later recovered from the backseat of another vehicle belonging to Buchanan, a Durango driven by Buchanan to the beach where she attempted to end her life and identified by Buchanan as hers. 5/23/12 RP 106.

At trial, Officer Schwallie testified that while infrared imaging can distort color, the suspect observed in the surveillance video in this case, based on his experience and knowledge of infrared imaging appeared to have a darker complexion skin compared to other persons captured on video surveillance that evening. Id at 179, Supp CP __ (sub nom exhibit 120). Schwallie also explained that after completing analysis of the video using reverse projection photogrammetry with persons standing in the same spots/angles wearing the same jacket as the suspect, he was able to estimate that the suspect's relative height was more likely to be 5'10 and unlikely to be 5'3. 5/29/12 RP 59. Ms. Buchanan was 5'3 and more heavy set, while Dunya was approximately 5'10" tall. 5/29/12 RP 67-68, 5/30/12 RP 267, See also Supp CP __ (sub nom exhibit 119).

Initially, the state charged both Buchanan and Dunya with first degree murder. CP 1, 5/30/12 RP 356, CP 206-07. While charges were pending, the state patrol crime lab conducted DNA tests on the rubber glove tips found around Kriston's body in her apartment. Prior to conducting the DNA test, forensic scientist Mariah Low sent a

consumption letter to the Bellingham Police Department explaining DNA testing on the glove tips would likely consume the entire sample of DNA collected. 5/29/12 RP 165, CP 105. Mariah Low, pursuant to lab protocol, requested authorization to consume the evidence to perform DNA testing. Prosecuting attorney, Dave McEachran subsequently authorized consumption but in an oversight, did not notify either Dunya or Buchanan's attorneys of the consumption request. CP 103, 105, 106, 66-77 (affidavit of David McEachran), *see also* parties stipulation CP 63-64.

In his affidavit, McEachran explained that when a crime is charged he has historically obtained a court order authorizing consumption, whereas when the matter is under investigation, he simply issues a letter, as he did in this case, authorizing the consumption and testing. *Id.* While his failure to notify Dunya was an oversight, McEachran also explained that given the posture of the investigation at that point in time it was important to get testing completed quickly to ascertain which of the two suspects he then had charged was responsible for Kriston's death. *Id.*

DNA testing of the tip of the rubber glove found at the murder scene confirmed the DNA found was that of Dunya within a 1:100 quintillion probability. 5/29/12 RP 146-7. Subsequently, Buchanan plead guilty to the amended charge of rendering criminal assistance in the first

degree and in exchange she agreed to testify to the events surrounding Kriston's death. 5/30/12 RP 247.

Dunya moved to suppress the state's DNA evidence asserting the prosecutor's failure to notify his attorney of the consumption letter violated his right to due process because he had requested prior notification of any forensic testing. CP 1-2-134. After hearing argument, the trial court concluded the state did not act in bad faith in failing to notify Dunya of the consumption request and suppression was therefore not warranted. 5/21/12 (vol.1) RP 76-77.

The trial court did however, permit the parties to enter into a stipulation explaining that the consumption request was made by the lab and that testing was authorized by the prosecutor without notifying Dunya. Additionally, the court gave Dunya wide latitude in cross examining forensic scientist Mariah Low on this oversight and its significant to lab protocol and expectations, permitted Dunya's defense expert Dr.Riley to explain why the prosecutor's failure to give Dunya the opportunity to independently observe testing affects the reliability and weight to be given to that evidence and otherwise, fully permitted Dunya to use the state's oversight to his advantage. Following a jury trial Dunya was convicted as charged. CP 7-9.

D. ARGUMENT

- 1. The trial court appropriately denied Dunya's motion to suppress DNA test results because the state did not violate its discovery obligations, destroy material exculpatory evidence or act in bad faith when it authorized consumption of evidence for DNA testing purposes.**

Dunya argues the trial court erred denying his request to suppress the admission of DNA test results at trial. Specifically, he argues suppression was warranted because the state authorized consumption of a DNA specimen extracted from the tip of a piece of rubber glove found at the crime scene without notice to Dunya. Dunya contends the state's consumption authorization "for the purpose of barring" Dunya from observing or verifying state DNA testing in light of his request for notice contained in his Notice of Appearance and Demand for Discovery denied him due process of law¹ and is

¹ Dunya asserted below that his due process claim was predicated on a discovery violation. CP 124-132, The state however, did not have a binding discovery agreement with Dunya at the time consumption for DNA testing was authorized. Discovery rule CrR 4.7 requires the prosecutor disclose information including reports or statements of experts, including the results of scientific tests, experiments and comparisons and disclose any expert witnesses whom the prosecuting attorney will call...., the subject of such expert testimony and any reports the experts have submitted to the prosecutor. See, CrR(a)(1)(iv), (2)(iii). CrR 4.7 does not however, require prior notice to the defense of scientific testing-even where such a request is made. Instead, CrR 4.7 broadly specifies that investigations are not to be impeded and only that the State is required to provide

akin to the state improperly destroying exculpatory evidence in bad faith. Br. of App. at 1.

If evidence is material and or potentially useful Dunya argues, a prosecutor may not hide or order its destruction in bad faith. Br. of App. at 9 *citing* Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.281 (1988). Nothing in the record below evidences the state sought to hide or destroy material evidence in bad faith by authorizing relevant DNA testing. Dunya's allegations are unfounded and should be rejected.

a. DNA found in the tips of rubber gloves found at the murder scene had no apparent material exculpatory value and while testing consumed the evidence, the consumption provided a test result discoverable and reviewable by the defense.

The state's duty to preserve material evidence is derived from the duty to disclose exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963). A defendant's constitutional due process rights are violated and a criminal case may be dismissed when the state fails to preserve

results of scientific tests and reports prepared by experts. CrR 4.7 (a)(1)(iv), (2)(iii) (1)(h)(1). This being said, the state typically will notify counsel prior to testing when a suspect has already been charged.

material exculpatory evidence. State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) (*citing* California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.413 (1984), and Youngblood, 488 U.S. 51).

Whether destruction of evidence constitutes a due process violation depends on the motivation of law enforcement in destroying the evidence and the nature of the evidence. State v. Groth, 163 Wn.App. 548, 261 P.3d 183 (2011) *citing*, Wittenbarger, 124 Wash. 2d, 475(*citing*, California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) and Youngblood, 488 U.S. 51. Failure to preserve materially exculpatory evidence can result in a due process violation. Id. In order for evidence to qualify as “material exculpatory evidence” however, the following two part test must be satisfied:

[The] evidence must be both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Trombetta, 467 U.S. at 489.

Dunya cannot demonstrate the evidence he contends was impermissibly destroyed by DNA testing possessed an

exculpatory value that was apparent before DNA testing was performed. What was apparent before testing if anything, was that the DNA evidence found was potentially incriminating to the person who committed Kriston's murder. No value could otherwise be ascribed to the evidence until or unless it was tested. Groth, 163 Wash. App. 548 (Groth's assertion that physical evidence collected at the scene was materially exculpatory was speculative because none of the evidence had apparent exculpatory value without testing or analysis.) *See also*, State v. Copeland, 130 Wash. 2d 244, 922 P.2d 1304 (1996), (no due process violation where the State crime lab discarded remaining DNA evidence after the DNA was scientifically tested).

The DNA evidence found in the glove tips were not of exculpatory value pursuant to the standard set forth in Youngblood. Moreover, even though the DNA testing consumed evidence found on the gloves, Dunya still retained an ability to challenge testing procedures and the weight to be given to the DNA results based on the 100 pages of written and typed notes forensic scientist Mariah Low provided regarding the testing conditions, procedure and protocol followed during

DNA testing. In other words, the consumption by testing did not destroy evidence but provided other evidence that Dunya could and did analyze and use to attack the credibility and reliability of the test results, including the fact that Dunya was not given the opportunity to observe or confirm the DNA testing himself. Based on that and the testimony of Dunya's expert Dr. Riley, Dunya argued to the jury that no weight should be given to the DNA test results because protocol of notifying the defense was not met, the defense couldn't observe testing first hand and the methods explained in the notes reflected ample opportunity for a false positive result due to contamination.

Under these circumstances, Dunya cannot show the state's authorization to consume evidence by testing deprived him of materially exculpatory evidence or that he did not have comparable evidence of the testing itself after the DNA sample was consumed.

b. Dunya fails to show the consumption of evidence for DNA testing was authorized in bad faith where the error was an oversight and the evidence was potentially inculpatory not exculpatory.

If the evidence in question would have been 'potentially

useful’, though not materially exculpatory, a defendant must demonstrate bad faith on the part of law enforcement in failing to preserve evidence to support a constitutional due process violation. Youngblood, 488 U.S. at 58, State v. Copeland, 130 Wn.2d 244, 280, 922 P.2d 1304 (1996). Potentially useful evidence is “evidentiary material of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant.” Youngblood, 488 U.S. at 57, State v. Groth, 163 Wn.App. 548, 261 P3d 183 (2011).

As explained in Arizona v. Youngblood, 488 U.S. at 58, even if destroyed evidence is potentially useful, a defendant must still also demonstrate the state acted in bad faith in destroying potentially useful evidence to support a due process claim.

We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.

Youngblood, 488 U.S. at 58.

In Youngblood, the state negligently failed to preserve

fresh semen samples collected from the victim and the victim's clothing. Notwithstanding that failure, the court determined that unless the defendant could demonstrate bad faith on the part of law enforcement, failure to preserve the potentially useful evidence does not constitute a denial of due process of law.

Bad faith examines the motivation of law enforcement in destroying the evidence. Groth, 163 Wn.App. 548. In other words, was the destruction "improperly motivated." Wittenbarger, 124 Wash. 2d, 478; *see also*, Guzman v. State, 868 So.2d 498, 509 (Fla. 2004) (holding a "determination of bad faith does not turn on whether law enforcement officers followed established procedures," and that "bad faith exists only when law enforcement officers intentionally destroy evidence they believe would exonerate a defendant." *Citing*, Youngblood), State v. Patterson, 356 Md. 677, 698, 741 A.2d 1119 (1999) ("the intent or motive behind the destruction of the potential evidence is generally a determinative factor" in deciding whether bad faith exists).

Looking at the language of Youngblood, a finding of bad faith requires Dunya to demonstrate the evidence was

destroyed, or in this case, consumption was authorized with intent to deprive the defendant of the ability to prepare a defense. See, e.g., Guzman, 868 So. 2d, 509 (the Court held a “determination of bad faith does not turn on whether law enforcement officers followed established procedures” and that “bad faith only exists when law enforcement officers intentionally destroy evidence they believe would exonerate defendant,” *citing Youngblood*.) See also, State v. Groth, 163 Wn.App. 548, where this court rejected the analysis suggested by Dunya that the state’s failure to follow established protocol or suggested guidelines demonstrates bad faith.

In his concurring opinion in Youngblood, Justice Stevens noted that the destroyed evidence in that case was more likely to have been inculpatory than exculpatory and the destruction of such evidence more damaging to the state’s case than defense. Id at 59. Under those circumstances, “the uncertainty as to what the evidence might have proved was turned to the defendant’s advantage.” Id at 60. Accordingly, the court reflected the state had a strong incentive to preserve the evidence and inferentially was not motivated to destroy such evidence. Id at 59.

Similarly here, the state had every incentive to ensure established lab protocol and office policy of notifying the defense or obtaining a court order was followed. The prosecutor's oversight was turned to Dunya's advantage-Dunya extensively cross examined forensic scientist Mariah Low on lab protocol, attacked the reliability of DNA testing by presenting expert witness Dr.Riley's who testified his inability to be present for testing and confirm that no cross contamination could have occurred during testing, coupled with written procedures that reflected contamination could have occurred, rendered the DNA results unreliable. These facts demonstrate the state had no incentive to authorize consumption without notifying Dunya or obtaining a court order and subject the testing evidence to such a rigorous challenge.

Moreover, the record reflects the prosecutor authorized consumption in an oversight and not with the intent of depriving Dunya of meaningful evidence. Instead, the prosecutor explained he inadvertently made the authorization focusing on law enforcements efforts to obtain relevant evidence to further determine whether Dunya or Kara

Buchanan shot Kriston. *See*, CP 66-77 (Declaration of Prosecuting Attorney David McEachran).

Given these facts, the trial court reasonably determined the state did not authorize consumption for DNA testing in bad faith pursuant to the standards set forth in Youngblood and appropriately denied Dunya's motion to suppress the results of the DNA testing on the rubber glove tips. The trial court's remedy of denying Dunya's request for suppression but entering a stipulation into evidence explaining the prosecutor's failure to notify Dunya prior to authorizing consumption and permitting extensive cross examination, direct testimony from the defense witness and argument by Dunya sufficiently addressed any due process concerns raised. Suppression was not warranted. The trial court decision should therefore be affirmed on appeal.

2. **The trial court exercised sound discretion in admitting expert testimony of forensic analyst officer Schwallie regarding relative skin tone and height of a suspect found on infrared video surveillance because his testimony was helpful to the trier of fact in viewing and understanding admitted infrared video surveillance of a suspect.**

Dunya argues the prosecution used unfair tactics to obtain his conviction by having investigators impermissibly opine on the identity of

the suspect in video surveillance thereby invading the province of the jury. Br. of App. at 25. The record reflects investigators did not impermissibly opine that Dunya was the suspect observed in the video. The trial court, in its sound discretion instead appropriately limited testimony and only permitted testimony regarding skin tone and relative height of the suspect observed in infrared video surveillance to the extent it was relevant and helpful to the jury. Under these circumstances, Dunya fails to demonstrate the trial court abused its considerable discretion.

A trial court's decision to admit evidence is reviewed for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. Id at 181. Even if evidence is erroneously admitted, reversal is not warranted 'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.' State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). A reviewing court will find an abuse of discretion only if it concluded no reasonable person would have ruled as the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

A witness may testify based on personal knowledge and give opinion testimony if is rationally based on the perception of the witness

and such testimony helpful to understanding testimony or a fact at issue.

ER 701.² Additionally, Under ER 702,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Improper opinion testimony is testimony that is based on a witness's belief rather than direct knowledge of facts. State v. Saunders, 120 Wash. App. 800, 811, 86 P.3d 232 (2004). A witness may not testify as to their opinion regarding the defendant's credibility because that determination falls exclusively within the province of the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). "Testimony regarding a defendant's statements and demeanor is not opinion and thus is admissible if relevant." State v. Day, 51 Wn. App. 54, 552, 754 P.2d 1021, *rev. den.*, 111 Wn.2d 1016 (1988).

In determining whether testimony constitutes impermissible opinion testimony, courts generally consider five factors: 1) the type of witness involved; 2) specific nature of testimony; 3) nature of the charges;

² ER 701 provides: If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of ER 702.

4) type of defense; and 5) other evidence before the jury. Demery, 144 Wn.2d at 759. “[T]estimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.” Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), *rev. den.*, 123 Wn.2d 1011 (1994).

Prior to trial Dunya pursuant to a motion in limine, to exclude officer’s from opining that the suspect observed in video surveillance was Dunya or that the suspect appeared to be African American. CP 78-79. The parties agreed identification of the video surveillance suspect as Dunya based on the officer’s perception of the video surveillance would be improper. The court also agreed Schwallie could not opine that the suspect appeared to be African American instead limiting Schwallie’s testimony, based on his analysis of all of the persons caught by video surveillance on the evening in question, his knowledge of infrared video and his analysis of the height of the suspect by reverse projection photogrammetry, that the suspect’s skin tone appeared to be darker than others observed on video surveillance that evening/morning (relevant because Kara Buchanan who had confessed to the killing, had a lighter skin tone), that the suspect appeared to be closer to 5’10 in height than 5’4. (relevant because Dunya was 5’10 and Buchanan who initially

confessed to the killing was considerably shorter at 5'3 or 5'4.) And finally, that the suspect appeared to be carrying on object that looked like a long barreled shot gun as he or she walked to and from Kriston's apartment on the night of her murder.

Dunya contends on appeal, that the trial court nonetheless abused its discretion by permitting officer to testify that the suspect appeared to have darker skin tone than others observed on video surveillance the night Kriston was killed because this essentially allowed the officer to impermissibly testify to ethnicity of the suspect as a proxy for race. Br. of App. at 27, 29.

The record does not support Dunya's allegations. The trial court appropriately limited testimony only permitting Schwallie to testify to his factual perceptions of the suspect in the video based on his familiarity with infrared video imaging concluding that while infrared cameras distort color, the observed suspect appeared to have a darker complexion compared to "others observed" on the video surveillance that night. RP 184(5/29/12). In context, Schwallie's testimony does not identify Dunya as the suspect or make any reference to the ethnicity of the suspect. On cross examination, Dunya himself further clarified that the officer's testimony regarding skin tone was based on comparisons made to other unknown persons captured by video surveillance that night and

emphasized that infrared enhancement used by night surveillance videos can distort color tone, suggesting that the jury could not necessarily trust the officer's conclusion or the video itself that the suspect was a darker complected person. 2RP 77-80 (5/29/12). Beyond making allegations that this testimony was a proxy for race, Dunya fails to demonstrate how Schwallie's limited testimony was used improperly to identify Dunya as the suspect during the trial or in closing arguments. Schwallie's testimony was clearly relevant and was helpful to the jurors because it assisted them in understanding and viewing the infrared video surveillance footage from the crime scene area on the night Kriston was shot.

Dunya also complains that the trial court impermissibly permitted Schwallie to testify that the suspect in the video appeared to be male, 5'10 in height carrying an item that to him, appeared to look like a long firearm. Br. of App. at 27. Again, such testimony did not impermissibly opine Dunya was the suspect. Instead, Schwallie's testimony regarding the reverse projection photogrammetry sought to help the jury understand the relative size of the image of the suspect captured in video surveillance as it related to the facts and suspects in this case. Using stand-in persons of different heights, in the same location and wearing the same coat as the suspect was observed from the camera's where the observations were made, Schwallie estimated, based on his experience and video analysis

expertise, the relative height of the observed suspect. Such testimony was helpful and relevant to the jury determining who the suspect observed on surveillance may have been. Contrary to Dunya's argument, this evidence was not presented to the jury as a reenactment but as a tool used to estimate the approximate height of the suspect and to provide context to the video surveillance images of the suspect for the jury.

3. **The jury special verdict required the jury to find Dunya was armed with a firearm at the time of the commission of the offense and further explained, though referencing a deadly weapon instruction inclusive of firearm, that a firearm is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.**

Next, Dunya contends the sentencing court erred imposing a firearm enhancement to his sentence because "the jury's special verdict" found only that Dunya possessed a "deadly weapon." Br. of App. at 33. Alleged jury instruction errors are reviewed de novo. State v. Porter, 150 Wn.2d 732, 735, 82 P.3d 234 (2004). Dunya misstates the record.

The jury instructions in this case reveal the jury found Dunya was armed with a firearm at the time of the commission of his crime of first degree murder. CP 37(special verdict form). Moreover, while the jury was instructed that to return special this special verdict they had to find beyond a reasonable doubt Dunya was armed with a 'deadly weapon'

inclusive of a firearm, they were additionally instructed on the definition of a firearm. CP 59, 60. Specifically, the jury was instructed that a “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gun powder. CP 60. These instructions support the jury finding that Dunya committed his offense while armed with a firearm. See, State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008).(firearm enhancement requires the jury be instructed a firearm is a weapon or devise from which a projective may be fired by an explosive such as gun powder.)

Under Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010), a trial court may not impose a firearm enhancement, even when a firearm is used for the predicate crime where the jury finds by special verdict that the defendant used a deadly weapon in committing a crime. State v. Williams-Walker, 167 Wn.2d 898. The instructions in this case however, do not present the same issue presented in Williams-Walker contrary to Dunya’s argument. The instructions in this case in contrast to Williams-Walker demonstrate the firearm sentence enhancement was appropriately predicated on the jury finding that Dunya was armed with a firearm during the commission of his crime. This jury finding is predicated on two instructions, one that explained the requirements to return a special verdict form and defined a ‘deadly weapon’ as including a firearm and another,

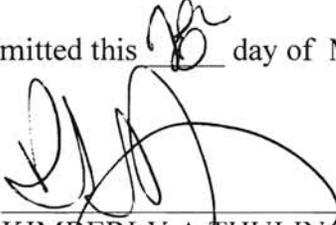
which further defined a firearm. When the jury is instructed on a specific enhancement and makes its finding, the sentencing court is bound by the jury's finding.

Dunya's firearm enhancement is therefore predicated on the jury appropriately concluding, based on the instructions given as a whole; he used a firearm in committing his first degree murder offense.

E. CONCLUSION

Based on the forgoing, the state respectfully requests this Court affirm Dunya's judgment and sentence for first degree murder with a firearm enhancement.

Respectfully submitted this 10 day of March, 2014.

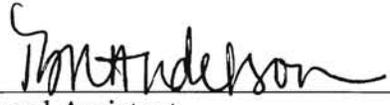


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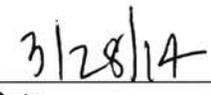
CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, Nancy Collins, addressed as follows:

Washington Appellate Project
1511 Third Ave, Ste 701
Seattle, WA 98101



Legal Assistant



Date