

[Cite as *State v. Durham*, 2010-Ohio-1416.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92681

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE DURHAM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500502

BEFORE: Gallagher, A.J., Sweeney, J., and Jones, J.

RELEASED: April 1, 2010

**JOURNALIZED:
ATTORNEY FOR APPELLANT**

Richard A. Neff
614 W. Superior Avenue
Suite 1310
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Kevin L. Rosenberg
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Andre Durham appeals his conviction for assault on a police officer under R.C. 2903.13(A), a felony of the fourth degree. For the reasons stated below, we affirm.

{¶ 2} Durham was arrested on the night of August 5, 2007, after the Warrensville Heights police responded to a 911 call on a report of domestic violence at Durham's residence. Officer Stephen Paris investigated the incident. Durham was arrested by Officer Paris for disorderly conduct at the residence and transported back to the Warrensville Heights police station for booking. Officer Paris testified that on the way to the station, Durham was threatening to hurt him once his handcuffs were removed. Officer Paris claimed Durham was swearing, intoxicated, upset, and angry. Officer Nakia Franklin, who was working in the jail, attempted to calm Durham down, but he was abusive to her.

{¶ 3} Officer Paris claimed that when they were at the booking area, Durham spat in his face and, as a result, he pushed Durham out of his way. Officer Paris and another officer, named Turner, then restrained Durham. Officer Franklin testified that in response, Durham kicked Officer Paris in the knee. The booking process was then suspended and Durham was taken to a cell, but he continued resisting officers throughout the episode.

{¶ 4} Durham denied spitting on Officer Paris, but claimed Officer Paris blamed him for doing so and struck Durham in the throat and choked him.

Durham admitted kicking at the officer, but claimed it was only to get Officer Paris off him. Durham claimed he was handcuffed with his hands behind his back and the cuffs were too tight. He admitted he was angry because the police entered his home without a warrant.

{¶ 5} Officer Paris denied choking Durham. Officer Franklin testified that Officer Paris and Officer Turner used only the force necessary to subdue Durham.

{¶ 6} At trial, there was no dispute that a digital videotape system was in place and operational at the time of the incident in the booking area and that it captured the events between Officer Paris and Durham. Nevertheless, the videotape footage was not preserved. The uncontroverted testimony was that no one destroyed or tampered with the video system or the footage in question. Rather, it appears after 30 days the footage was “recycled” or “taped over” and thus lost.

{¶ 7} Durham was indicted on August 31, 2007, on charges of assault on a police officer in violation of R.C. 2903.13(A), and retaliation in violation of R.C. 2921.05(A). He entered a plea of not guilty to the charges at the arraignment. Thereafter, Durham filed a general request for discovery on September 21, 2007. On November 6, 2007, Durham filed a motion to have the case dismissed or to have the testimony limited regarding the events

purportedly captured on the missing videotape. The trial court denied this request.

{¶ 8} Prior to trial, the court granted a Crim.R. 29 dismissal of the retaliation charge. A jury trial commenced on July 9, 2008. The jury returned a guilty verdict on the assault on a police officer charge, and the court sentenced Durham to six months in prison. Durham then filed this timely appeal.

{¶ 9} Durham raises two assigned errors for our review. In his first assigned error, Durham asserts the trial court erred in not dismissing the complaint or in failing to restrict testimony about events captured on video, because of the state's failure to preserve the videotape in violation of his due process rights. In his second assigned error, Durham claims the verdict was against the manifest weight of the evidence.

{¶ 10} For the reasons outlined below, we find no violation of due process arising from the failure to preserve the videotape of the incident or the trial court's decision not to limit the testimony about the incident in the absence of the video. Further, we find the weight of the evidence supported the conviction.

{¶ 11} The Supreme Court of Ohio has recognized, "in accordance with the decision of the Supreme Court of the United States in *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, that the suppression of

materially exculpatory evidence violates a defendant's due process rights, regardless of whether the state acted in good or bad faith." *State v. Geeslin*, 116 Ohio St.3d 252, 254, 2007-Ohio-5239, 878 N.E.2d 1, citing *State v. Johnston* (1988), 39 Ohio St.3d 48, 60, 529 N.E.2d 898. To be materially exculpatory, "evidence must 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." *California v. Trombetta* (1984), 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413. "Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." *Id.* at 485.

{¶ 12} However, "[t]he possibility that [evidentiary material] could have exculpated [the defendant] if preserved or tested is not enough to satisfy the standard of constitutional materiality." *Arizona v. Youngblood* (1988), 488 U.S. 51, 56, 109 S.Ct. 333, 102 L.Ed.2d 2, at fn. "A clear distinction is drawn by *Youngblood* between materially exculpatory evidence and potentially useful evidence. If the evidence in question is not materially exculpatory, but only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation." *Geeslin*, 116 Ohio St.3d at 254. Therefore, when evidence is only potentially useful, its destruction does not violate due process unless the police acted in bad faith

when destroying the evidence. *State v. Miller*, 161 Ohio App.3d 145, 2005-Ohio-2516.

{¶ 13} The “potentially useful” standard is applied in situations where the state has failed to preserve evidence “of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” See *Geeslin*, 116 Ohio St.3d at 254, quoting *Youngblood*, 488 U.S. at 57. “The term ‘bad faith’ generally implies something more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of the fraud. It also embraces actual intent to mislead or deceive another.” (Citations and quotations omitted.) *State v. Smith*, Montgomery App. No. 20247, 2005-Ohio-1374, at ¶7.

{¶ 14} In his first assigned error, Durham maintains there are two exceptions to the general rule that the burden is on a defendant to prove missing evidence is materially exculpatory. First, Durham claims when a defendant moves to preserve evidence that is subsequently destroyed, the burden shifts to the state to show the inculpatory value of the evidence. Second, Durham claims when the state fails to preserve evidence before a defendant has a reasonable opportunity to request preservation, while the defendant must still show the evidence was more than potentially useful and

would have been used to establish his or her innocence of the charge at issue, the standard is relaxed. Durham's claims fail on both counts.

{¶ 15} The state asks us to analyze the missing evidence under both the “materially exculpatory” and “potentially useful” standards. In deciding this issue, it is important to note that in the *Geeslin* case, both the Third District Court of Appeals and the Supreme Court of Ohio, albeit for different reasons and using different standards, appeared to see these two standards as mutually exclusive. The Third District analyzed the missing evidence in *Geeslin* under the “materially exculpatory” standard, while the Supreme Court of Ohio reversed that finding and viewed the missing evidence under the “potentially useful” standard. *Geeslin*, 116 Ohio St.3d 252; *State v. Geeslin*, Mercer App. No. 10-05-06, 2006-Ohio-1261. The Supreme Court of Ohio concluded the missing videotape evidence in *Geeslin* did not contain actual footage of the alleged crime or event at issue. *Geeslin*, 116 Ohio St.3d at 253. Thus, the court concluded the missing videotape evidence could only be categorized as “potentially useful.” *Id.* at 255. The court distinguished cases like *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693 and *State v. Durnwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, 837 N.E.2d 1234, where the defendants sought missing or destroyed videotape evidence to challenge the substance of the allegations against them, from cases where the

evidence was instead only “potentially useful” or did not capture an actual crime or event at issue. *Geeslin*, 116 Ohio St.3d at 255.

{¶ 16} Generally, missing videotape evidence that purports to contain images of an actual crime or event at issue speaks for itself. Simply put, such direct evidence is by its very nature either inculpatory or exculpatory, or some combination of the two, and there is likely no “test” of that footage that would be necessary to yield a result that would exonerate the accused.

{¶ 17} Nevertheless, we cannot say with certainty that the Supreme Court of Ohio would never apply the “potentially useful” standard to evidence that purports to directly capture a crime or an event at issue. There may be limited circumstances where such footage is considered only “potentially useful,” even where it captures the complete event.

{¶ 18} In the present case, no one disputes the videotape system captured events between the officers and Durham in the jail on August 5, 2007. The missing footage would either show Durham assaulted Officer Paris, and was thus inculpatory, or it would show Durham was the object of a police assault, and exculpatory. It might also show a combination of the two. Thus, we must consider the standard of whether the missing evidence was materially exculpatory. See *Youngblood*, 488 U.S. at 58.

{¶ 19} While there was considerable testimony regarding videotaping in the booking area of the jail, no witness offered a comprehensive understanding

of the video system in place or the policies involving the preservation of videotapes at the jail. The record indicates a motion-activated, digital taping system was in place and the resulting footage was stored on either a computer “hard drive” or tape. By all accounts, the video system “recycled” or “recorded over” footage after 30 days, unless the footage was removed or saved for future use.

{¶ 20} Thus, even if Durham had filed a specific discovery request to preserve the tape on September 6, 2007, the date when his arraignment was originally scheduled to take place, by that time 31 days had passed, and by all accounts any footage was already destroyed. Therefore, we need not address the question of whether a general or specific request for the preservation of video footage was required in a discovery request. See *Columbus v. Forest* (1987), 36 Ohio App.3d 169, 522 N.E.2d 52.

{¶ 21} In the present case, no one viewed the videotape before it was erased; therefore, Durham cannot show that the evidence was materially exculpatory. The tape may have supported Durham’s version of events at the jail, but like Durham, we are left with the inability to say that the videotape would show a clear set of facts that would either support a full dismissal or a limitation on the testimony surrounding the events.

{¶ 22} Even if we were to consider the videotape as potentially useful, there is no evidence of bad faith to show that Durham’s due process rights

were violated. Officers Paris and Franklin both testified they did not tamper with or destroy the footage. They indicated that, to their knowledge, Officer Turner did not tamper with or erase the footage. Both claimed they were unaware the footage would be recycled or taped over after 30 days. They assumed the administrative staff would save any footage of any event that was warranted. Under these facts, regardless of what standard we employ, there is no evidence that the police acted to destroy or eradicate the footage. Thus, we cannot find that bad faith occurred in the failure to preserve the videotape evidence.

{¶ 23} The bigger question that remains is whether the state should have preserved the videotape evidence on the fundamental principle that the videotape was arguably necessary to the defense because it captured the events at issue. Generally, the state guarantees the accused the right to present a complete defense when it affords him access to evidence, but the defense does not enjoy an absolute right to all evidence that may be in possession of the state. Rather, the right of a criminal defendant to have access to evidence is extended only to evidence that is material. *Forest*, 36 Ohio App.3d at 171.

{¶ 24} Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose

contents are unknown and, very often, disputed. *Trombetta*, 467 U.S. at 486.

We face the same task here.

{¶ 25} While videotapes in the exclusive possession of the state that show an event at issue should arguably always be preserved, no policy was violated in this case by failing to preserve the footage. This creates a troubling result. We cannot say the missing footage captured inculpatory or exculpatory facts, but we are certain it captured one or the other or a combination of both. Durham's inability to demonstrate the possible exculpatory value beyond his personal claim of what it would show creates a "Catch-22" like situation that he cannot overcome.

{¶ 26} Barring a departure from present case interpretation that places the burden on the defendant to show the evidence was materially exculpatory, we cannot say the trial court acted in error. We note that in other jurisdictions, the legislatures have moved to mandate preservation of videotaped evidence regardless of a discovery request. In South Carolina, the legislature has determined that all OVI traffic stops must be videotaped, as well as any testing conducted at a police facility, and the footage preserved. See S.C.Code 1976 § 56-5-2953. Similarly, Texas mandates that jail house confessions be videotaped and the footage preserved or the confession is inadmissible. See Tex. Code Crim. Proc. Art. 38.22. Ohio has not adopted such requirements.

{¶ 27} Further, the Supreme Court of Ohio has thus far refused to infer that destroyed videotapes are inherently exculpatory. Absent such a view, we cannot extend the law in this instance to warrant a dismissal or the exclusion of testimony arguably covered on the missing video.

{¶ 28} For the above reasons, Durham's first assigned error is overruled.

{¶ 29} In his second assigned error, Durham claims his conviction is against the manifest weight of the evidence. In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 68, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 30} Here, the evidence was clear that Durham was intoxicated at 4:00 a.m., when Officer Paris arrested him at his residence. Durham's wife called police because of his intoxicated and disruptive state. Durham was combative and threatening throughout the arrest and booking process. Once at the jail, he swore at Officer Franklin, who was attempting to calm him.

When the officers intervened, he spat on Officer Paris and was then pushed out of the way. Although Durham claimed Officer Paris struck him in the throat and attempted to choke him, both Officer Franklin and Officer Paris disputed this account.

{¶ 31} Durham acknowledges he kicked at Officer Paris and struck him, albeit because he felt he was being wrongly attacked by the officer. Officer Paris denied striking Durham in the throat area and maintained he pushed Durham away only after being spat on.

{¶ 32} In this case there were two differing versions of the events offered. Thus, it was a credibility question for the jury to determine. The rationale for giving such deference to the findings of the trial judge or jury is that they are “best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, after reviewing the entire record, weighing the evidence and all reasonable inferences, we cannot say that this is the exceptional case where the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Accordingly, Durham’s second assignment of error is overruled.

{¶ 33} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR