

William D. Ladigo appeals his conviction of Battery Resulting in Bodily Injury,¹ a class A misdemeanor, and Disorderly Conduct,² a class B misdemeanor, presenting the following restated issue as the sole issue on appeal: Did the trial court err in sustaining the State's trial objection to Ladigo's inquiry into missing evidence?

We affirm.

The underlying facts are that on February 10, 2009, Ladigo participated in a poker tournament at the Square One Pub (the Pub) in Martinsville, Indiana. Pub employee Brandon McGhehey was working security at the event. Around midnight, McGhehey heard Ladigo yelling that he wanted to buy back into the tournament after being eliminated. Tournament rules permitted a player to buy back into the tournament one time following elimination. Ladigo had already done this and was now complaining that he was not allowed to do so again and thereby to re-enter the tournament a second time. Ladigo asked to speak with the person in charge and McGhehey informed Ladigo that he was the bouncer and that Ladigo should talk to him (i.e., McGhehey). Ladigo responded loudly and profanely, whereupon McGhehey instructed Ladigo - three times - to leave the Pub. Ladigo refused to leave.

McGhehey went outside to his truck and retrieved items including a nightstick, a gun, handcuffs, and mace. He returned to the Pub and instructed Ladigo for a fourth time to leave the establishment. At that point, friends of Ladigo told McGhehey that they would make Ladigo leave. McGhehey agreed and stood back against a wall to monitor the situation.

¹ Ind. Code Ann. § 35-42-2-1(a)(1)(A) (West, PREMISE through 2009 1st Regular Sess.).

² Ind. Code Ann. § 35-43-1-3(a) (West, PREMISE through 2009 1st Regular Sess.).

When Ladigo passed by McGhehey, Ladigo said, “[N]ow, tell me I’m wrong again[.]” *Transcript* at 12. McGhehey responded, “About the poker game? ... [Y]eah, you’re wrong[.]” *Id.* At that point, Ladigo head-butted McGhehey, cutting the bridge of McGhehey’s nose in the process. McGhehey attempted to subdue Ladigo by grabbing his arms, whereupon Ladigo punched McGhehey in the eye, causing a gash and a black eye. A struggle ensued and at some point Ladigo picked up a chair to throw it at McGhehey. McGhehey armed himself with his nightstick and Ladigo threw the chair, missing McGhehey. McGhehey placed Ladigo in a headlock and started marching him toward the door. Ladigo began biting McGhehey’s left side and under his left arm, inflicting a total of three bite wounds, all of which drew blood. McGhehey hit Ladigo across the back with his nightstick and Ladigo “snapped out of it” and, escorted by his friends, left the Pub. *Id.* at 18.

Officer Anthony Hollis of the Martinsville Police Department was dispatched to the scene. By the time he arrived, Ladigo had returned to the Pub to apologize to McGhehey. When Officer Hollis arrived at the Pub, McGhehey and Larry Balsey, the Pub’s owner, were reviewing video surveillance footage of the incident while Ladigo waited in a hallway. Ladigo was allowed to leave, but was later arrested after Officer Hollis spoke with McGhehey. Ladigo was charged with battery resulting in bodily injury and disorderly conduct. Officer Hollis asked Balsey for a copy of the surveillance tape. Balsey responded that he was not sure how the system worked, but he provided the officer with a tape. When prosecutors later reviewed the tape, they discovered it was blank.

At his bench trial, Ladigo’s counsel cross-examined Officer Hollis about the tape, as

reflected in the following trial excerpt:

Q. Okay. You asked Larry Balsey, the owner, to make ... or to give you a copy of the video tape so everyone could see exactly what happened here, right?

A. Yes, I did.

Q. And you explained to him why it was important, right?

A. Correct.

Q. Okay. Because then there wouldn't be any question about what did or didn't happen in the bar that evening, right?

A. Correct.

Q. And there would be some potential civil liability if his employee had pulled a weapon on a patron, right?

Id. at 50. At this point, the State interposed an objection on grounds of relevance. The trial court sustained the objection. Ladigo was convicted as charged at the conclusion of trial.

Ladigo contends the trial court erred in sustaining the State's objection on relevancy grounds and preventing Ladigo from inquiring into the reason the surveillance tape provided by Balsey was blank. A trial court's decision to exclude evidence is afforded great deference on appeal, and that decision will be reversed only for a manifest abuse of discretion that denies the defendant a fair trial. *Bryant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004), *trans. denied*. These principles apply as well when, as here, evidence has been excluded on relevancy grounds. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401.

Ladigo contends the question of why a copy of the surveillance tape was not provided was relevant because it tended to call into question the veracity of McGhehey's account of his altercation with Ladigo. According to Ladigo, if the tape showed that McGhehey pulled a weapon on Ladigo, Balsey would be motivated to destroy the tape "to cover up his own involvement in the event and undercut his employee's version of the incident." *Appellant's Brief* at 5. Ladigo contends the evidence is unavailable "due to the action of the police in failing to preserve [the] evidence" and therefore "a presumption must flow in favor of the defendant that the evidence if available would have been beneficial to the defendant." *Id.* Ladigo further claims the trial court's refusal to permit him to inquire into the subject was a violation of his due process rights.

Ladigo presents this issue in terms of the preservation of evidence, yet the most reasonable inference to be drawn is that the State never possessed the surveillance video in the first place – the Pub sent a blank video instead. Nevertheless, we will address the issue in the terms presented by Ladigo. When deciding whether the State has violated a defendant's due process rights by failing to preserve evidence, we determine whether that evidence was "potentially useful evidence" or "material exculpatory evidence", as these terms were employed in *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Blanchard v. State*, 802 N.E.2d 14 (Ind. Ct. App. 2004).

Our United States Supreme Court has defined potentially useful evidence as "evidentiary material 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." [*Arizona v. Youngblood*, 488 U.S. at 57]. As such, the State's failure to preserve the evidence does not constitute a violation of due process rights unless the defendant shows bad faith on the part of the police.

Id. at 26-27.

In the instant case, Officer Hollis testified that he obtained a tape from Balsey but did not know it was blank until the prosecutor's office so advised him shortly after it was procured. The officer did not attempt again to secure a copy of the tape, and testified upon cross-examination that he could not remember why he did not pursue the matter further. On the facts of this case, such does not evince bad faith on the part of the law enforcement agency involved with respect to securing a copy of the tape.

In order to rise to the level of "material exculpatory evidence", the evidence must "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*, 467 U.S. 479, 489 (1984). When evidence is defined as material exculpatory evidence, the State's good or bad faith in failing to preserve it is irrelevant. *See California v. Trombetta*, 467 U.S. 479. Although a defendant "is not required to prove conclusively that the destroyed evidence is exculpatory, there must be some indication that the evidence was exculpatory." *Blanchard v. State*, 802 N.E.2d at 27.

In the instant case, McGhehey testified that he reviewed the tape with Balsey on the night of the incident and, in response to a question posed by the prosecuting attorney, agreed that "it showed everything [McGhehey] talked about" at trial. *Transcript* at 22. We understand that McGhehey's assertion in this regard essentially corroborated his own testimony and therefore is not of great significance in this inquiry. We note, however, that in addition to McGhehey, Officer Hollis, and Ladigo, only one other person testified at trial.

That person, Justin Shrout, was a disinterested eyewitness to the incident. His testimony generally corroborated McGhehey's account of the occurrence, most notably with respect to McGhehey's testimony that Ladigo was the initial aggressor and that McGhehey did not brandish a gun before he was attacked by Ladigo. Thus, other than Ladigo's self-serving assertion that the tape would have corroborated his testimony, there is no indication that it would have done so.

Ladigo cites *California v. Trombetta*, 467 U.S. 479 for the proposition that there is a constitutional presumption in favor of the defendant that evidence missing as a result of the police's failure to preserve it would have been beneficial to the defendant. In *Trombetta*, the United State Supreme Court held that the Constitution imposes upon the states the duty to preserve evidence "that might be expected to play a significant role in the suspect's defense." *Id.* at 488. As indicated above, to meet this standard of constitutional materiality, the evidence must, among other things, "possess an exculpatory value that was apparent before the evidence was destroyed[.]" *Id.* at 489. Contrary to Ladigo's assertion, *Trombetta* does not create or authorize an automatic assumption that missing evidence is exculpatory merely on the basis that it is missing. Rather, the Court indicated that courts may consider the surrounding circumstances in determining whether the evidence was exculpatory (e.g., where the claim was based upon missing breath samples, the Court observed, "[i]n all but a tiny fraction of cases, preserved breath samples would simply confirm the Intoxilyzer's determination that the defendant had a high level of blood-alcohol concentration.... Once the Intoxilyzer indicated that respondents were legally drunk, breath samples were much more

likely to provide inculpatory than exculpatory evidence”). *Id.* We cannot assume the missing tape contained exculpatory material when the record is devoid of such an indication. *See Blanchard v. State*, 802 N.E.2d 14. Therefore, the trial court did not commit reversible error in refusing to permit Ladigo to question Officer Hollis as to why the surveillance tape supplied by Balsey was blank.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.