[Cite as *State v. Beavers*, 2015-Ohio-1161.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26036
	:	
v.	:	Trial Court Case No. 2010-CR-2971
	:	
REUBIN J. BEAVERS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 27th day of March, 2015.

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WELBAUM, J.

{¶ 1} In this case, Defendant-Appellant, Reubin Beavers, appeals from his conviction and sentence on one count of possession of marijuana and one count of possession of crack cocaine in an amount more than one gram but less than five grams. After the jury found Beavers guilty, the trial court sentenced him to community control for a term not to exceed five years, and suspended his driver's license for six months. The court then stayed the execution of sentence pending appeal.

{¶ 2} In support of his appeal, Beavers contends that the trial court erred in the following ways: (1) by overruling his motion to suppress; (2) by overruling his motion to dismiss the case based on the State's discovery violations; (3) by failing to instruct the jury on the term "knowingly" after the jurors raised a question during deliberations; and (4) by denying a separation of witnesses at the suppression hearing.

{¶ 3} We conclude that the trial court did not err in overruling the motion to suppress, because the traffic stop of the automobile Beavers was driving, and the patdown search of Beavers, were reasonable. In addition, the State's inability to provide tapes of the incident involving Beavers was not done in bad faith, nor did the tapes contain potentially useful evidence. The trial court also did not abuse its discretion in failing to re-instruct the jury after receiving a question during deliberations. The court accurately answered the jury's question, and the instruction the defense requested had already been given to the jury. Finally, the trial court properly complied with Evid.R. 615 by allowing the State's witness to remain present during a hearing on the defense motion to suppress evidence. As a result, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 4} In February 2011, Reubin Beavers was indicted for possession of crack cocaine and possession of marijuana. The charges arose from a traffic stop that occurred on September 15, 2010. On that date, Dayton Police Officer, Sean Humphrey, was traveling westbound on Delaware Avenue, approaching Salem Avenue, with his windows at least partially rolled down. Humphrey noticed an odor of fresh-cut marijuana. At that time, he was about two to three car-lengths behind a Dodge Magnum that Beavers was driving. Humphrey indicated that he had previously transported marijuana in his own cruiser, and could often smell it for several hours, depending on where it had been placed. He had also smelled marijuana outside cars and houses.

{¶ 5} After smelling the marijuana, Humphrey followed the Magnum for a short time. The Magnum turned left on Salem Avenue, traveled southbound, and then made a right-hand turn several blocks later to travel westbound on Cambridge Avenue. The two vehicles were the only ones travelling the same route, and Humphrey continued to smell the marijuana smell. The Magnum then turned onto N. Broadway Street, and Humphrey initiated a traffic stop after about a block.

{¶ 6} Although it was only around 7:00 p.m., Humphrey was unable to see inside the vehicle because of its dark window tint, which was on the back window and all side windows of the vehicle. Humphrey decided to stop the vehicle because of the dark window tint and the smell of marijuana.

{¶ 7} As Humphrey walked up to the car, he could not see inside the car due to the tint, so he asked the driver to roll down the back windows so that he could see how many occupants were inside the car. Humphrey continued to smell the same marijuana smell

as he walked up to the car, and when the window went down, the odor continued to get stronger. There were three occupants in the car – the driver, a front passenger, and a rear passenger.

{¶ 8} After obtaining identification from the individuals inside the car, Humphrey walked back to his cruiser to check the identification. Dayton Police Officer, Kari Staples, then arrived on the scene. At that point, Humphrey went back to remove the occupants from the vehicle due to the overwhelming smell of marijuana. Humphrey removed Beavers from the driver's side and began to pat him down for officer safety. Humphrey told Beavers to keep his arms up, but Beavers continued to try to lower his arms. According to both officers, Humphrey had to tell Beavers several times not to put his hands in his pockets. During the search, Humphrey felt a couple of small bags in Beavers' pocket, consistent with how he had found marijuana packaged in the past. Humphrey could also feel a baggy with several small crunchy substances similar to crack cocaine. Humphrey retrieved the bags from Beavers' pocket and placed Beavers in the back seat of his cruiser. Staples also removed the passengers and placed them in her cruiser. Humphrey and Staples then conducted an extensive search of the Magnum, but they did not find any other contraband in the car. They also did not find any contraband on the passengers.

{¶ 9} At the time of this incident, the officers' patrol cars were equipped with an older VHS-type camera system that had issues with tapes not working properly. When an officer turned on the cruiser lights, the system automatically began recording. The camera was located between the passenger seat and the ceiling and hung down where the rearview mirror would be. The recording system was in the trunk of the cruiser,

inside a locked metal box. Patrol officers did not have a key to access the system; instead, in order to get the tape or to change a tape, a police sergeant would have to come to the location and remove the tape. The video camera recorded what the front of the camera saw.

{¶ 10} There were also two microphones, one inside the patrol car, and a wireless one that the officer wore. In addition to recording video, the system also recorded audio. If the officer exited the cruiser, the system was designed to record transactions outside the vehicle. The system also recorded conversations inside the cruiser. Under departmental policy, officers were to check the equipment at the beginning of each shift, in order to make sure it was functioning properly.

{¶ 11} After the officers finished searching the car, Beavers was arrested and was charged in Dayton Municipal Court with marijuana and window tint violations. He was then indicted several months later in common pleas court, for possession of crack cocaine and marijuana.

{¶ 12} Beavers testified both at trial and at a hearing on whether the indictment should be dismissed based on the State's failure to provide evidence. In both situations, Beavers' testimony differed from that of the police officers. According to Beavers, Humphrey did not explain to him why he was being stopped. However, Beavers and the other individuals in the car gave Humphrey their identification, and Humphrey then got back into his cruiser. In the meantime, Staples pulled up and parked behind Humphrey's cruiser. Humphrey was in his cruiser for two to three minutes, and returned. At that point, Humphrey reached into the car, unlocked the door, grabbed Beavers' arm, and pulled him out of the car.

{¶ 13} Humphrey then pulled Beavers to the rear of the Magnum. Beavers denied raising his own hands up and down, and said that when he asked Humphrey what he did to deserve this, Humphrey did not answer, but just started putting his hands down Beavers' pockets. Beavers stated that Humphrey found two sacks of marijuana (about enough for two marijuana cigarettes), threw them on the car, and finished searching. Nothing more was found at that time. Humphrey placed Beavers in his cruiser. At that time, Staples removed the other people from the Magnum and placed them in her cruiser, which was parked behind Humphrey's cruiser.

{¶ 14} Both officers searched the Magnum. Humphrey could not get into the glove box, which was locked, and came back to the cruiser to ask Beavers about it. However, Beavers said he did not have a key, because the Magnum was not his car. After returning to the Magnum, Humphrey eventually searched the backseat. Humphrey then came back to the cruiser and presented Beavers with a baggy of what appeared to be crack cocaine. When Humphrey asked Beavers the identity of the owner of the drugs, Beavers said that he did not know anything about the cocaine. Humphrey told Beavers that if no one claimed the crack cocaine, it would be considered Beavers' drug, because he was driving the vehicle. Trial Transcript, Vol. III, pp. 299-300; Transcript of March 22, 2013 Hearing on Remand, p. 38.

{¶ 15} After Humphrey found the crack cocaine, he removed Beavers from the car, handcuffed him, and administered Miranda warnings. As was noted, Beavers was charged with window tint and marijuana violations in municipal court. Beavers obtained an attorney, and filed a motion on October 22, 2010, asking the City of Dayton to preserve the videotapes of the incident. At the time, the police department had a policy of

retaining tapes for 45 days, at which point they would be subject to erasure and recycling into other cruisers. Beavers' request was made within the 45-day time period.

{¶ 16} The prosecutor did not respond to Beavers' request. However, Humphrey received an email from the defense attorney, who asked that the tape be preserved. At that point, Humphrey asked a sergeant to obtain the tape for him. Humphrey then tagged the tape into the property room on November 15, 2010.

{¶ 17} As was noted, Beavers was subsequently indicted in common pleas court in February 2011 on the cocaine and marijuana charges. In March 2011, Beavers filed a motion to suppress evidence, and an evidentiary hearing was held on April 29, 2011. The trial court then overruled the motion to suppress on May 10, 2011.

{¶ 18} Subsequently, on August 11, 2011, Beavers filed a motion to compel the production of evidence and/or for dismissal. In the motion, Beavers contended that video recordings of the traffic stop appeared to unavailable and would be relevant. Beavers asked the court to order production of any State reports, and to hold an evidentiary hearing.

{¶ 19} However, an evidentiary hearing was not held. Instead, the State and defense filed stipulated facts on November 29, 2011. Among the stipulated facts were that: (1) after Humphrey smelled fresh, unburned marijuana while following the car that Beavers was driving, Humphrey stopped the car; (2) Staples also stopped her cruiser behind Humphrey's cruiser; (3) both cruisers had audio and video recording capabilities, and both recorded some or all of the stop; (4) the recordings were saved and maintained pursuant to department policy; and (5) the audio and video recordings were not preserved by the police department, and were unavailable to Beavers at the time of his indictment.

{¶ 20} Apparently, at the time the motion was filed and decided, the parties were under the impression that the tapes had been destroyed. However, at a later point, the tape from Humphrey's cruiser was found, but was blank.[1] In his memorandum in support of the motion, Beavers argued that the tapes would be highly relevant, and that:

> Moreover, because of the unparalleled incredibility of the claim that, apparently, 1.86 grams of unburned marijuana in a plastic baggie inside the pants pocket of the defendant produced such a smell that the officer driving behind the defendant could smell it, the obvious and reasonable need for the defendant to view the tapes should be apparent to anyone.

November 30, 2011 Memorandum in Support, p. 4.

{¶ 21} On December 13, 2011, the trial court granted Beavers' motion to dismiss. The court observed that the prosecutor failed to respond to Beavers' request for the tapes, which was filed prior to the 45-day period, and that the tapes were thereafter destroyed. Thus, the court concluded that the State had breached its duty to respond in good faith to the timely request. The court further concluded that Beavers had shown prejudice because there were no other witnesses to the stop other than the two police officers, and no other "alternate channels" available for Beavers to challenge the officers' version of the stop. As a result, the court dismissed the indictment with prejudice.

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[1] At trial, Humphrey indicated, as noted, that he had tagged the tape from his cruiser and had placed it in the property room on November 15, 2010. At some point, the tape was located in the property room by Sgt. Wilhite, who was the current public records administrator for the Dayton Police Department at the time of trial. However, when the tape was reviewed, only "snow" or blank tape was observed on the portion of the tape that would have covered the September 15, 2010 stop and arrest. Sgt. Rike, the public records administrator at the time of the incident, indicated that there would be no way to erase only a portion of the tape. The tape from Staples' cruiser was apparently never located.

{¶ 22} In January 2012, the State appealed from the judgment dismissing the indictment. We reversed the trial court's judgment in December 2012, concluding that the trial court had applied the wrong standard in dismissing the indictment. *State v. Beavers*, 2012-Ohio-6222, 986 N.E.2d 516 (2d Dist.)(*Beavers I*). We remanded the case for reconsideration using standards established by the Supreme Court of Ohio in *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865 and *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1. *Beavers I* at ¶ 11, 16, 22-23, and 28. In particular, we noted that:

> In this case, Beavers' counsel argued to the trial court that the video recording would have shown the actions taken by the police officers at the scene and would have provided "objective facts surrounding the decision to search first the defendant and then the car." Beavers emphasized that the stop was based in part on Officer Humphrey's claim that he could smell unburnt marijuana from his cruiser while driving behind Beavers' vehicle. Only 1.86 grams of marijuana was found during the stop. Thus, Beavers argued that the cruiser video recordings would undermine the legitimacy of the stop of the vehicle and the search of his person. He did not claim that he did not, in fact, possess the baggies of marijuana and cocaine. Under *Geeslin*, it would appear that the video recordings would not be materially exculpatory, but only potentially useful. However, following [*Columbus v.*] *Forest*, [36 Ohio App.3d 169, 522 N.E.2d 52 (10th Dist.1987)], the trial court never engaged in this analysis.

Beavers I, 2012-Ohio-6222, 986 N.E.2d 516, at ¶ 24.

{¶ 23} Following the remand, the trial court held an evidentiary hearing on March 22, 2013. At that time, defense counsel objected on the basis that the only way to meet the burden imposed by the court of appeals would be to have the defendant testify and essentially waive his Fifth Amendment rights. Nonetheless, as was noted above, Beavers testified at the hearing, and indicated that he did not possess the crack cocaine, that Humphrey had brought the drug to the cruiser after finding it in the car, and that Humphrey falsely told him that if he did not implicate someone else, he would be charged with possession of the drug because he was driving the car.

{¶ 24} The parties submitted post-trial memoranda after the hearing, and the trial court overruled the motion to dismiss in May 2013. The jury trial then took place in November 2013. After the presentation of evidence, which included the same testimony that Beavers gave at the motion hearing, the jury found Beavers guilty of both charges. At the sentencing hearing, the trial court sentenced Beavers to community control sanctions and a six-month driver's license suspension, but granted a stay of execution of the sentence pending appeal. Beavers now appeals from his conviction and sentence.

II. Motion to Suppress

{¶ 25} Beavers' First Assignment of Error states that:

> Defendant Was Denied Due Process When the Court Overruled Defendant's Motion to Suppress.

{¶ 26} Under this assignment of error, Beavers contends that the stop of the automobile was unlawful because it was based on a smell that would have been nearly

impossible to detect. In this regard, Beavers focuses on the fact that he was driving down the road at 35 miles per hour, with the windows rolled up, and that Humphrey was two to three car lengths away. In response, the State argues that the stop was based on dark window tint and the smell of marijuana, and that the officers' testimony indicated that the smell of marijuana can linger long after it has been removed from a vehicle.

{¶ 27} Both the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution prohibit unreasonable searches and seizures. *State v. Moore*, 90 Ohio St.3d 47, 48, 734 N.E.2d 804 (2000). "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant." *Id.* at 49, citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). (Other citation omitted.) "This requires a two-step analysis. First, there must be probable cause. If probable cause exists, then a search warrant must be obtained unless an exception to the warrant requirement applies. If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed." *Id.*, citing *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). (Other citation omitted.)

{¶ 28} In *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, the Supreme Court of Ohio noted that:

> The United States Supreme Court has stated that a traffic stop is constitutionally valid if an officer has a reasonable and articulable suspicion that a motorist has committed, is committing, or is about to commit a crime. *Delaware v. Prouse* (1979), 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660; *Berkemer v. McCarty* (1984), 468 U.S. 420, 439, 104 S.Ct. 3138, 82

> L.Ed.2d 317, quoting *United States v. Brignoni–Ponce* (1975), 422 U.S. 873, 881, 95 S.Ct. 2574, 45 L.Ed.2d 607. Further, "[t]he propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Freeman* (1980), 64 Ohio St.2d 291, 18 O.O.3d 472, 414 N.E.2d 1044, at paragraph one of the syllabus.
>
> Therefore, if an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all the circumstances, then the stop is constitutionally valid.

Mays at ¶ 7-8.

{¶ 29} Officer Humphrey's stated reasons for stopping the vehicle were that the window tint was impermissibly dark (a fact that Humphrey later verified by applying a window tint meter to the windows), and the odor of marijuana. The trial court apparently chose to believe Humphrey. We have often stressed that in ruling on motions to suppress, a trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford*, 93 Ohio App.3d 586, 592, 639 N.E.2d 498 (2d Dist.1994), citing *State v. Clay*, 34 Ohio St.2d 250, 298 N.E.2d 137 (1973). "Accordingly, in our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Id.*

{¶ 30} We have previously indicated that observation of a window tint violation is

sufficient justification to stop an automobile. *State v. Stewart*, 2d Dist. Montgomery No. 19961, 2004-Ohio-1319, ¶ 13-15. "Moreover, consistent with the Fourth Amendment, both the driver and passengers of a lawfully stopped vehicle may be ordered out of the vehicle pending completion of the traffic stop." *Id.* at ¶ 15, citing *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), and *Maryland v. Wilson,* 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997).

{¶ 31} Even if Humphrey had not smelled the odor of marijuana emanating from the car while he was following it, Humphrey was justified in stopping the Magnum, based on the suspected window tint violation.

{¶ 32} We observed in *Stewart* that "[a]uthority to conduct a patdown search for weapons does not automatically flow from a lawful stop; a separate inquiry under *Terry v. Ohio*, [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889], is required." *Id.* at ¶ 16, citing *State v. Evans*, 67 Ohio St.3d 405, 409, 618 N.E.2d 162 (1993). "The point of that inquiry is whether the officer was 'justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer and others.' " *State v. Phillips*, 155 Ohio App.3d 149, 2003-Ohio-5742, 799 N.E.2d 653, ¶ 22 (2d Dist.), quoting *Terry* at 24. "If that justification exists, the officer may reasonably conduct a pat-down search for weapons." *Id.* " 'And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.' " *Id.*, quoting *Terry* at 27.

{¶ 33} "Intertwined with the reasonableness requirement is the other requirement

of *Terry* that the officer's suspicion must be 'articulable.' That connotes more than a mere subjective pronouncement. It requires demonstrable facts that, together with any rational inferences that may be drawn from them, reasonably support a conclusion that the suspect is armed and dangerous. The conclusion is necessary to the independent judicial review that a Fourth Amendment challenge to a pat-down search involves." *Phillips* at ¶ 23.

{¶ 34} After the vehicle was stopped, Humphrey again smelled the odor of marijuana. He stated at the suppression hearing that he and Officer Staples decided to remove the occupants and search the car due to the strong odor of marijuana. "When individuals are suspected of crimes like drug trafficking, for which they are likely to be armed, the right to frisk is 'virtually automatic.' " *Phillips* at ¶ 25, quoting *Evans*, 67 Ohio St.3d at 413, 618 N.E.2d 162. "The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search." *Moore*, 90 Ohio St.3d at 47, 734 N.E.2d 804, syllabus. Under established authority, Humphrey was entitled to remove Beavers from the car and to search the car. He was also entitled to patdown Beavers for officer safety.

{¶ 35} Humphrey indicated at the suppression hearing that he conducted a patdown to make sure Beavers did not have any weapons, and for officer safety. Humphrey stated that Beavers was very nervous and kept putting his hands in his pockets. Humphrey thought Beavers may have been trying to retrieve a weapon.

{¶ 36} Under the circumstances, the stop and the search of Beavers were not unreasonable, and the trial court did not err in overruling the motion to suppress evidence. Accordingly, the First Assignment of Error is overruled.

III. Dismissal of the Indictment

{¶ 37} Beavers' Second Assignment of Error states that:

> Defendant Was Denied Due Process When the Motion to Grant Dismissal of His Case Was Subsequently Overruled and Set for Trial.

{¶ 38} Under this assignment of error, Beavers argues that he was deprived of due process by the absence of the tapes from the cruiser. According to Beavers, the evidence was potentially useful because it would have shown the reason for the stop and whether proper procedure was followed. Beavers also contends that the police acted in bad faith by violating their own evidence retention polices and an Ohio statutory prohibition against tampering with evidence.

{¶ 39} As was noted, we concluded in *Beavers I* that the trial court had applied an incorrect legal standard to the issue of whether the indictment should be dismissed, based on evidence that had been lost or destroyed. *Beavers I,* 2012-Ohio-6222, 986 N.E.2d 516, at ¶ 24. We, therefore, remanded the case for reconsideration using standards established by the Supreme Court of Ohio in *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, and *Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1. *Beavers I* at ¶ 1, 11, 16, 22-23, and 28.

{¶ 40} In *Geeslin*, the Supreme Court of Ohio discussed whether a due process violation "occurs when evidence in the State's possession is not purposely suppressed, but is lost or destroyed." *Id.* at ¶ 7. In this regard, the court commented that:

> The Supreme Court of the United States addressed this issue in *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d

> 281. In that case, the court stated: "The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady* [*v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 1963)], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve 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." *Id.* at 57, 109 S.Ct. 333, 102 L.Ed.2d 281. In that situation, the court held, "Unless a criminal 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 of law." *Id.* at 58, 109 S.Ct. 333, 102 L.Ed.2d 281.

Geeslin at ¶ 9.

{¶ 41} In *Geeslin*, the defendant needed the taped evidence to challenge the propriety of the stop. *Id.* at ¶ 12. The Supreme Court of Ohio concluded that the evidence could not have been materially exculpatory because it was not being used to challenge the substance of the allegations against the defendant. Instead, the evidence was merely potentially useful because it would have been used only with respect to the validity of the stop. *Id.* at ¶ 13.

{¶ 42} "Evidence is constitutionally material when it possesses 'an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably

available means.' " *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 74, quoting *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). "The defendant bears the burden to show that the evidence was materially exculpatory." *Id.* (Citation omitted.)

{¶ 43} In *Beavers I,* we concluded that the trial court had improperly followed a burden-shifting analysis from *Forest*, 36 Ohio App.3d 169, 522 N.E.2d 52, "which held that, when the State fails to respond in good faith to the defendant's request to preserve evidence, the State bears the burden to show that the destroyed evidence was not exculpatory, but the defendant must show that the evidence could not be obtained by other means." *Beavers I,* 2012-Ohio-6222, 986 N.E.2d 516, at ¶ 7. We noted that after *Forest* was decided, neither the Supreme Court of the United States nor the Supreme Court of Ohio had attached weight to the factor of a defendant's prior request. *Id.* at ¶ 19-22. Furthermore, in deciding to reverse the trial court's judgment, we stressed that Beavers failed to "claim that he did not, in fact, possess the baggies of marijuana and cocaine." *Id.* at 24. Instead, Beavers' argument was related to the facts surrounding the decision to search Beavers and the car. *Id.* This is consistent with the distinction in *Geeslin* between substantive allegations and those that pertain only to the validity of a stop. *Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, at ¶ 12-13.

{¶ 44} Notably, the State's appeal that was before us in *Beavers I* was based on facts that had been stipulated. *Id.* at ¶ 7. On remand, the trial court held an evidentiary hearing, at which Beavers testified that he did not possess the crack cocaine and that it was not obtained from his pocket. Instead, according to Beavers, Officer Humphrey found the crack cocaine in the back of the automobile after Beavers was in the cruiser,

and then falsely told him that he would be charged with possession, since he was the driver. Because the discussion between Beavers and Humphrey on this point would have been recorded, if it occurred, the missing tape could have had material exculpatory value. There were also no other witnesses to this incident, and no alternate means of presenting the evidence.

{¶ 45} "Evidence is material within the meaning of *Brady* [*,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),] only if there exists a ' "reasonable probability" ' that the result of the trial would have been different had the evidence been disclosed to the defense." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 338, citing *Kyles v. Whitley*, 514 U.S. 419, 433–434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), which in turn quotes *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). " 'A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' " *Davis* at ¶ 338, quoting *State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988), paragraph five of the syllabus.

{¶ 46} There could be a reasonable probability that the outcome of the trial would have been different if the tape had not been blank. If the tape supported Beavers' account of the incident, he would not have been guilty of possession of crack cocaine.

{¶ 47} However, this is not the argument that Beavers presented in the trial court (even though he testified to that effect during the evidentiary hearing on his motion to dismiss the indictment). Instead, Beavers argued only that "[t]he erased segments of the video have criminal evidentiary value because it shows the reason for the traffic stop and if the police followed proper procedure." Doc. # 4, April 1, 2013 Post Hearing Memorandum, p. 2. The trial court also did not rule on this argument, instead adopting

the reasoning in the State's post-hearing memorandum. *See* Doc. # 6, May 14, 2013 Decision and Entry Vacating Decision Filed December 13, 2011 and Overruling "Motion to Dismiss," p. 1. The State's memorandum focused solely on the evidence as it pertained to the validity of the stop. *See* Doc. # 5, April 18, 2013 Post Hearing Memorandum.

{¶ 48} In addition, Beavers has not presented this argument on appeal. Instead, Beavers focuses on the allegedly unusual circumstances surrounding the stop – the officer's smelling of marijuana while driving behind another vehicle; the search of a licensed driver for a minor violation of window tint; the fact that no evidence of marijuana was found other than a small baggie; and the destruction of the tape before the normal time-period for disposing of evidence had expired. Based on these facts, Beavers argues that the material was potentially useful to challenge the stop, and that the police acted in bad faith by tampering with evidence.

{¶ 49} To the extent that Beavers' argument relates to the traffic stop and search – it is not even potentially useful. As the State points out, a video-tape would have proven nothing regarding the smell of marijuana. In addition, as the State also notes, Humphrey testified at the motion hearing that the video footage would not have shown the percentage of tint on the windows. Transcript of March 23, 2013 Hearing on Remand, p. 59. Humphrey testified that the best way to determine window tint would be to use a window tint meter, which he did, in fact, use at the scene to determine that the window tint only allowed 14% of the light to enter through the window, when the law requires 50% of the light to go through the window. *Id.* at pp. 55-58. Thus, we cannot conclude that the video-tape would have been useful with respect to these matters.

{¶ 50} As a final matter, even if the tape had contained potentially useful evidence, there was no proof of bad faith. The evidence indicated that Humphrey retrieved the tape shortly after receiving the request, and checked it into the property room. Although the tape appears to have been misplaced, it was later located. Unfortunately, the portion of the tape relating to Beavers' incident was blank. There is no evidence that the tape was erased, however. In fact, the police officer familiar with the tape system testified that the system was unreliable, that the system frequently malfunctioned and did not record, and that there was no way to erase only a portion of the tape, as occurred here. Accordingly, even if the evidence had been potentially useful, we see no evidence of bad faith.

{¶ 51} Based on the preceding discussion, the Second Assignment of Error is overruled.

IV. Jury Questions

{¶ 52} Beavers' Third Assignment of Error states that:

> The Trial Court Erred to the Prejudice of the Appellant in Failing to Instruct the Jury with "Knowingly."

{¶ 53} Under this assignment of error, Beavers contends that when the jury sent questions to the court during deliberations, the court should have instructed the jury on the term "knowingly."

{¶ 54} After the jury began deliberations, the jury sent the judge the following questions:

Is the driver automatically charged if the crack is in the car? Is that illegal even if

> it's not on his person? In other words, if the crack is only in the car, then is this driver liable, no matter who else is in the car?

Trial Transcript, Vol. III, p. 387.

{¶ 55} The trial court separated this inquiry into two questions, with the second question beginning with "In other words." By agreement of counsel, the court answered both questions "no," and sent the information back to the jury. Defense counsel, however, asked the court to also give the jury the instruction on the term "knowingly" again. The defense position was that because the jury's question touched on constructive possession, and the State was proceeding on actual knowledge, the jury should be told that before it could find Beavers guilty, the jury must find beyond a reasonable doubt that Beavers knowingly possessed crack cocaine. *Id.* at p. 388. In contrast, the State objected on the basis that this would highlight the instruction that had already been given. The trial court agreed with the State, and also concluded that the requested instruction went beyond the question that the jury presented.

{¶ 56} Beavers argues that the trial court should have given the instruction because the jury was obviously confused and giving the instruction would have assisted them.

{¶ 57} " 'Where, during the course of its deliberations, a jury requests further instruction, or clarification of instructions previously given, a trial court has discretion to determine its response to that request.' " *State v. Tobin*, 2d Dist. Greene No. 2005 CA 150, 2007-Ohio-1345, ¶ 87, quoting *State v. Carter*, 72 Ohio St.3d 545, 651 N.E.2d 965 (1995), paragraph one of the syllabus. " 'A reversal of a conviction based upon a trial court's response to such a request requires a showing that the trial court abused its

discretion.' " *Id.*, quoting *Carter* at 553.

{¶ 58} An abuse of discretion " 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "[A]n abuse of discretion most commonly arises from a decision that was unreasonable." *Wilson v. Lee*, 172 Ohio App.3d 791, 2007-Ohio-4542, 876 N.E.2d 1312, ¶ 11 (2d Dist.), citing *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 300, 741 N.E.2d 155 (2d Dist.2000). (Other citation omitted.) "Decisions are unreasonable if they lack a sound reasoning process." *Id.*

{¶ 59} After reviewing the record, we find no abuse of discretion on the part of the trial court. The jury had already been instructed on the elements of possession of crack cocaine, and the court had specifically defined the term "knowingly" in connection with that charge. *See* Trial Transcript, Vol. III, pp. 346-347.

{¶ 60} The jury's question was apparently based on Beavers' testimony about Humphrey's alleged threat that Beavers could be prosecuted, as the driver, for any drugs found in the car. No evidence was presented during trial to indicate whether or not this was a true legal statement. In telling the jury that Beavers could not be liable, the trial court cleared up any confusion that might have existed, and allowed the jury to consider, as the defense would have wanted, how this alleged threat bore on Humphrey's credibility. The choice for the jury was not whether Beavers had constructive possession of drugs. Instead, the choice was whether Humphrey found crack cocaine in Beavers' pocket, i.e., that Humphrey knowingly possessed the drug, or whether the crack cocaine was found in the car, and Humphrey decided to improperly charge Beavers with it anyway. The jury was already properly instructed on this point, and further instruction

was not required.

{¶ 61} Accordingly, the Third Assignment of Error is overruled.

V. Separation of Witnesses

{¶ 62} Beavers' Fourth Assignment of Error states that:

> Defendant Was Denied the Separation of Witnesses, Rule 615.

{¶ 63} Under this assignment of error, Beavers contends that the trial court erred in refusing to grant a defense request that Officer Humphrey be excluded from the suppression hearing. Humphrey was permitted to stay in the hearing as the State's representative, and, thus, was able to hear the testimony of Officer Staples before he testified at the hearing. Beavers contends that he was deprived of due process because this tainted the testimony.

{¶ 64} In responding to this assignment of error, the State first contends that Beavers failed to object to either officer's testimony at the suppression hearing, and that we should, therefore, review the matter only for plain error. This assertion is incorrect, because Beavers specifically objected at the suppression hearing to the fact that Humphrey was being permitted to stay in the courtroom during the testimony of Officer Stapes. *See* April 29, 2011 Transcript of Hearing on Motion to Suppress, pp. 4-5.

{¶ 65} Evid.R. 615 controls the issues of separation of witnesses, and provides, in pertinent part, that:

> (A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.

An order directing the “exclusion” or “separation” of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

(B) This rule does not authorize exclusion of any of the following persons from the hearing:

* * *

(2) an officer or employee of a party that is not a natural person designated as its representative by its attorney * * *.

{¶ 66} In *State v. Hartzell*, 2d Dist. Montgomery No. 17499, 1999 WL 957746 (Aug. 20, 1999), we noted that:

“The Rule [615] is predicated on the well-established and time-honored practice of separating witnesses in order to facilitate the exposure of inconsistencies in their testimony and to prevent the possibility of a witness shaping his or her testimony to conform with that of another.” *Weissenberger's Ohio Evidence*, Treatise, Section 615.1. A trial court that denies the request abuses its discretion under the Rule absent a showing that the witness or witnesses concerned fits one of the exceptions identified in the Rule. *Id*.

Subsection (2) of the Rule prohibits its application to a prospective witness who is “an officer or employee of a party which is not a natural person designated as its representative by its attorney.” The witness then fills the role of the party that a natural person otherwise fills when he or she

> is a party. In that event, and notwithstanding the fact that the witness later testifies, his or her presence as a party's representative who can assist counsel in presentation of a case on his principal's behalf supersedes the prophylactic purposes of excluding prospective witnesses.

Id. at *3.

{¶ 67} In view of the fact that the State is permitted to designate an officer or employee as its representative, even if that individual may later testify, the trial court did not abuse its discretion by allowing Humphrey to remain for the entirety of the suppression hearing. Accordingly, the Fourth Assignment of Error is overruled.

VI. Conclusion

{¶ 68} All of Beavers' assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . .

FAIN, J. and HALL, J., concur.

Copies mailed to:

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