IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 29958-9-III
Respondent,	)	
v.	)	
BEAU CHARLETON GARDEE,	)	UNPUBLISHED OPINION
Appellant.	)	

Brown, J. • Beau Charleton Gardee appeals his second degree burglary and second degree malicious mischief convictions. He contends the Yakima County Superior Court erred by denying his motion to dismiss the charges based on an alleged *Brady*[1] or *Youngblood*[2] violation or, alternatively, to suppress the fruits of an alleged unlawful search and seizure of his person. In a pro se statement of additional grounds for review (SAG), he further contends police tampered with evidence, the trial court admitted evidence violating the best evidence rule, and insufficient evidence supports his

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).
[2] *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

convictions. We affirm.

FACTS

Considering Mr. Gardee's contentions, we mainly draw the facts from the evidence presented at his unsuccessful dismissal and suppression motion hearing, and the court's related findings of fact and conclusions of law.

On December 6, 2010, Wapato Police Officers Michael Deccio and David Madril responded to a domestic disturbance involving Mr. Gardee. Mr. Gardee left the residence before police arrived, so the officers spoke with his brother and mother. The officers learned Mr. Gardee was inhaling starter fluid fumes from a soda bottle when his brother threw the bottle away and an altercation erupted between them. Starter fluid is an ether based substance used for automobiles. Officer Deccio personally knew Mr. Gardee had a history of inhaling starter fluid fumes from a soda bottle. He also smelled ether inside the residence.

About 20 minutes after leaving the residence, Officers Deccio and Madril responded to a security alarm at the Wapato Carquest Auto Parts store, located about a third of a mile from Mr. Gardee's home. The officers discovered one of the large plate glass windows on the front of the store was shattered. Officer Deccio investigated the scene and noticed the starter fluid cans were disarranged and some appeared missing. It appeared to him a person knocked over a fuel stabilizer bottle while reaching for starter

fluid cans. Officer Deccio believed Mr. Gardee was involved in the burglary.

About 20 minutes later, the officers saw Mr. Gardee walk around the side of the store and quickly retreat when he saw the officers. The officers ordered Mr. Gardee to stop, but he kept retreating. The officers chased Mr. Gardee, Officer Madril placed him on the ground, Officer Deccio handcuffed him, and both officers picked him back up. Officer Deccio then saw a can of Carquest brand starter fluid hanging out of Mr. Gardee's pocket and another on the ground beneath where he had laid. Officer Deccio immediately recognized the cans as the same type missing from the store. These events occurred in a public area. Officer Madril searched Mr. Gardee's person and found in his pocket a soda bottle containing starter fluid. Soon, a deputy found a third can of Carquest brand starter fluid behind the store. When the store manager checked the inventory, he noted he was missing three cans of Carquest brand starter fluid.

Mr. Gardee told the officers he bought the starter fluid cans from the Yakima Carquest Auto Parts store at 8:00 p.m. that evening, but the Yakima store closed at 6:00 p.m. The officers returned the starter fluid cans to the store manager based on a department policy against tagging flammable materials as evidence and "advised him to dispose of them anyway he saw fit." Report of Proceedings (RP) at 341. The State earlier claimed the officers destroyed the starter fluid cans according to policy. The officers did not record the lot numbers stamped on the starter fluid cans. Carquest Auto

Parts stores cannot determine a starter fluid can's store of origin based on lot number. Exhibits 10 and 13 were photographs of the three starter fluid cans.

The State charged Mr. Gardee with second degree burglary, second degree malicious mischief, and unlawful inhalation of fumes. He moved unsuccessfully to dismiss the charges based on an alleged *Brady* or *Youngblood* violation or, alternatively, to suppress the fruits of an alleged unlawful search and seizure of his person. The trial court dismissed the unlawful inhalation of fumes charge after the State rested its case. A jury found Mr. Gardee guilty as charged of second degree burglary and second degree malicious mischief. Mr. Gardee appealed.

ANALYSIS

A. Motion to Dismiss

The issue is whether the trial court erred by denying Mr. Gardee's motion to dismiss the charges based on an alleged *Brady* or *Youngblood* violation. He contends the State violated his due process right to a fair trial by failing to disclose or preserve the starter fluid cans or their lot numbers.

"We review alleged due process violations de novo." *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011). Under *Brady*, the State must disclose material evidence favorable to the defendant and, under *Youngblood*, the State must preserve such evidence for the defendant's use. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d

517 (1994). The State violates the defendant's due process right to a fair trial if it fails to fulfill either duty. *Id.* Different standards apply depending on which duty the defendant alleges the State violated. *Id.* Mr. Gardee argues the State violated both duties.

To establish a *Youngblood* violation, the defendant must show the State failed to preserve "'material exculpatory evidence,'" which "both possess[es] an exculpatory value that was apparent before it was destroyed and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Wittenbarger*, 124 Wn.2d at 475 (quoting *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). But if the State failed to preserve evidence that was merely "'potentially useful,'" the defendant must "show bad faith on the part of the State." *Id.* at 477 (quoting *Youngblood*, 488 U.S. at 58).

Mr. Gardee argues the starter fluid cans were both materially exculpatory and potentially useful, and the State acted in bad faith by failing to preserve them. We disagree. The State did not fail to preserve the starter fluid cans, it returned them to the store manager without notifying the defense. Moreover, no exculpatory value was apparent before returning the cans to the store manager and the cans were of a nature that Mr. Gardee was able to obtain comparables. Indeed, comparable cans were produced at trial in the form of Exhibits 10 and 13. Thus, Mr. Gardee fails to show the State violated the *Youngblood* duty to preserve. Mr. Gardee must therefore show the State violated the

Brady duty to disclose.

To establish a *Brady* violation, the defendant must show the evidence is "'favorable to the accused, either because it is exculpatory, or because it is impeaching'"; the evidence was "'suppressed by the State, either willfully or inadvertently'"; and "'prejudice . . . ensued.'" *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 486-87, 276 P.3d 286 (2012) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). Prejudice occurs if the evidence suppressed is material to guilt or punishment. *Mullen*, 171 Wn.2d at 894. Evidence is material if "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Stenson*, 174 Wn.2d at 487 (quoting *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). A reasonable probability is one that "'undermines confidence in the outcome.'" *Id.* (quoting *Kyles*, 514 U.S. at 434).

Mr. Gardee argues the State concealed the starter fluid cans by returning them to the store manager and misrepresenting to the defense that the officers destroyed them. He argues the can markings would have supported his defense that he bought the cans in the Yakima store. However, the Wapato store manager related Carquest stores cannot determine a starter fluid can's store of origin based on lot number, and the Yakima store was closed at the time Mr. Gardee stated he bought the cans. Considering the store

manager's testimony, Mr. Gardee fails to show the starter fluid cans were favorable to him. Further, Mr. Gardee fails to show prejudice ensued because the State's failure to disclose the starter fluid cans does not undermine confidence in the outcome of his trial by creating a reasonable probability of a different result. As the trial court correctly concluded, the starter fluid cans "had no evidentiary value over and above any similar starter fluid can that can be purchased from Car Quest." Clerk's Papers (CP) at 54. Thus, Mr. Gardee fails to show the State violated the *Brady* duty to disclose.

Given our analysis, we conclude the trial court did not err in denying Mr. Gardee's dismissal motion.

B. Suppression Motion

The issue is whether the trial court erred by denying Mr. Gardee's motion to suppress testimony and photographs he contends were the products of an unlawful search and seizure. He argues the police lacked reasonable suspicion he was involved in criminal activity and the search of his person was not a protective frisk. Further, he argues the police did not discover the starter fluid cans and soda bottle in plain or open view, but after unlawfully intruding on his person without prior justification. Finally, he argues police lacked probable cause to arrest at the handcuffing, so the search of his person could not be incident to a lawful custodial arrest.

Upon a trial court's denial of a suppression motion, we review challenged findings

of fact for substantial evidence, review challenged conclusions of law de novo, and determine whether the findings support the conclusions. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence is "a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "Unchallenged findings of fact entered following a suppression hearing are verities on appeal." *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Further, "conclusions entered . . . following a suppression hearing carry great significance for a reviewing court." *State v. Collins*, 121 Wn.2d 168, 174, 847 P.2d 919 (1993).

Initially, we note Mr. Gardee unpersuasively argues portions of findings of fact 1, 2, 3, 5, and 16 lack substantial evidence.[3] Thus, we turn to the challenged conclusions of

[3] First, Mr. Gardee challenges the finding his brother threw out a "PEPSI bottle which was full of starter fluid." CP at 52. But the State presented evidence Mr. Gardee's brother threw out a soda bottle from which Mr. Gardee had inhaled starter fluid fumes. The brand of soda bottle and how much starter fluid it contained is immaterial. Second, Mr. Gardee challenges the finding "[t]he officers were unable to locate defendant." CP at 53. But Officer Deccio testified Mr. Gardee left the residence before police arrived. Third, Mr. Gardee challenges the finding he "is known for being addicted to huffing starter fluid." CP at 53. But Officer Deccio testified he personally knew Mr. Gardee had a history of inhaling starter fluid fumes from an empty soda bottle. Whether Mr. Gardee's substance abuse in fact constituted addiction is immaterial. Fourth, Mr. Gardee challenges the finding "it appeared to the officers that the only product missing was Car Quest brand starter fluid." CP at 53. But Officer Deccio testified, "starter fluid was the only cans that appeared to be out of place." RP at 17. And, it is undisputed that Officer Deccio noticed the Carquest brand starter fluid cans were disarranged or missing. Lastly, Mr. Gardee challenges the finding starter fluid "is highly flammable and could be used as a weapon." CP at 54. Officer Deccio suggested but did not expressly state starter fluid is flammable. Because we conclude below the officers performed a valid search incident to Mr. Gardee's lawful custodial arrest, not a protective frisk for weapons, this finding is immaterial.

law.

We may affirm a trial court's denial of a suppression motion "on any ground supported by the record, even if the trial court made an erroneous legal conclusion." *State v. Avery*, 103 Wn. App. 527, 537, 13 P.3d 226 (2000). Here, the trial court concluded the starter fluid can and soda bottle police found in Mr. Gardee's pockets "were obtained following a legal *Terry*[4] frisk/search" or "through a plain view search," and the starter fluid can police found on the ground beneath where he had laid was not obtained via a search. CP at 55. Below we conclude the initial stop was a lawful custodial arrest, not an investigative detention, so we consider the record to determine whether police obtained the challenged evidence through a valid search incident to Mr. Gardee's lawful custodial arrest.

Under the federal and state constitutions, warrantless searches and seizures are presumed invalid unless justified by an established exception. *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). Exceptions to the warrant requirement are "'jealously and carefully drawn.'" *State v. Meneese*, 174 Wn.2d 937, 943, 282 P.3d 83 (2012) (quoting *State v. McKinnon*, 88 Wn.2d 75, 79, 558 P.2d 781 (1977)). An officer may, incident to a lawful custodial arrest, make a warrantless search "of the arrestee's person and the area within his or her immediate control." *State v. Valdez*, 167 Wn.2d 761, 769, 224 P.3d 751 (2009); *State v. Kirwin*, 165 Wn.2d 818, 824, 203 P.3d 1044

[4] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

(2009). A custodial arrest occurs when an officer manifests intent to detain a suspect in custody and seizes him or her in such a manner as to cause a reasonable person in the circumstances to believe he or she is "under a custodial arrest" and "not free to leave." *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004); *State v. Patton*, 167 Wn.2d 379, 387, 219 P.3d 651 (2009).

An officer may make a warrantless felony arrest in a public area based on probable cause. *State v. Solberg*, 122 Wn.2d 688, 696, 861 P.2d 460 (1993). An officer has probable cause if he or she "is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe that a suspect has committed or is committing a crime." *State v. Afana*, 169 Wn.2d 169, 182, 233 P.3d 879 (2010). If two or more officers "act[] together as a unit, the cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect." *State v. Maesse*, 29 Wn. App. 642, 647, 629 P.2d 1349 (1981). "Probable cause requires more than suspicion or conjecture, but it does not require certainty." *State v. Chenoweth*, 160 Wn.2d 454, 476, 158 P.3d 595 (2007).

Officers Deccio and Madril chased Mr. Gardee, Officer Madril took him to the ground, Officer Deccio handcuffed him, and both officers picked him up. These acts constituted a custodial arrest because they would cause a reasonable person in the

circumstances to believe he or she was under custodial arrest and not free to leave. Because the officers acted together in arresting Mr. Gardee, we consider their cumulative knowledge in deciding if they had probable cause to arrest him for a felony.

At the time they arrested Mr. Gardee, Officers Deccio and Madril had reasonably trustworthy information from his brother and mother that he was inhaling starter fluid fumes from a soda bottle when his brother threw the bottle away and an altercation erupted between them. The officers personally knew Mr. Gardee had a history of inhaling starter fluid fumes from a soda bottle, and they smelled ether inside the residence. They were aware the store was about a third of a mile away from Mr. Gardee's home and the burglary occurred about 20 minutes after they left the residence. The officers noticed the store's starter fluid cans were disarranged or missing, and they believed Mr. Gardee was involved in the burglary. They saw Mr. Gardee appear at the store about 20 minutes after they arrived, quickly retreat upon seeing them, and continue to retreat after they ordered him to stop.

Together, these facts and circumstances were sufficient to cause a reasonable officer to believe Mr. Gardee committed the burglary at the store. While Officers Deccio and Madril could not be certain in this belief until after they discovered the starter fluid cans and soda bottle, Mr. Gardee's arrest was supported by more than mere suspicion or conjecture. Thus, we conclude the officers had probable cause to arrest Mr. Gardee for a

felony. Therefore, the officers were permitted, incident to Mr. Gardee's lawful custodial arrest, to search his person and the area within his immediate control. They stayed within this scope by observing, photographing, and seizing the starter fluid cans and soda bottle from Mr. Gardee's pockets and the ground beneath where he had laid. It follows that the trial court properly denied Mr. Gardee's suppression motion.

C. SAG

First, we do not address Mr. Gardee's pro se *Brady* or *Youngblood* concerns because Mr. Gardee's counsel adequately briefed them and they are fully analyzed above. *See* RAP 10.10(a) (providing the purpose of a SAG is to "identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel").

Second, Mr. Gardee contends the officers deprived him of his due process right to a fair trial by tampering with the starter fluid cans. But Mr. Gardee fails to show such tampering actually occurred. For example, he argues there are two Carquest brand starter fluid cans on the store shelf in one photograph, while there are three in all earlier photographs. But Mr. Gardee is mistaken because three Carquest brand starter fluid cans are shown in each photograph. Thus, Mr. Gardee cannot prove police misconduct, as he

must to sustain this contention. *See State v. Oppelt*, 172 Wn.2d 285, 297, 257 P.3d 653 (2011) (requiring a defendant seeking dismissal under CrR 8.3(b) to prove "arbitrary government action or misconduct, which may include simple mismanagement," and "actual prejudice affecting his fair trial rights").

Third, Mr. Gardee contends the trial court erred by denying his suppression motion because the State failed to present originals, as required by "General Rule 1002." SAG at 1, 4. While Washington has no GR 1002, it is fair to assume Mr. Gardee meant to cite ER 1002, providing, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided . . . ." Mr. Gardee waived this contention because he did not raise it in the trial court. *See* RAP 2.5(a) (providing this court may reject any claim of error raised for the first time on appeal unless it involves "lack of trial court jurisdiction," "failure to establish facts upon which relief can be granted," or "manifest error affecting a constitutional right").

Finally, Mr. Gardee appears to contend insufficient evidence supports the jury's guilty finding in his second degree burglary and second degree malicious mischief convictions. He argues the jury did not adequately consider his defense that he bought the starter fluid cans from the Yakima store earlier. This contention is unpersuasive because it concerns witness credibility and evidence weight; we must defer to the jury on those matters. *See In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277

(2011). A rational jury could, after viewing the evidence in the light most favorable to the State, find the essential elements of second degree burglary and second degree malicious mischief beyond a reasonable doubt. *See State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012); *see also* former RCW 9A.52.030(1) (2010) (providing a defendant commits second degree burglary if he or she "enters or remains unlawfully in a building," and does so "with intent to commit a crime against a person or property therein"); RCW 9A.48.080(1)(a) (providing a defendant commits second degree malicious mischief if he or she "[c]auses physical damage to the property of another in an amount exceeding seven hundred fifty dollars").

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

_____ _____
Siddoway, A.C.J. Kulik, J.