

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT WORLEY,	§	
	§	No. 284, 2013
Defendant Below-	§	
Appellant	§	Court Below: Superior Court
v.	§	of the State of Delaware in and
	§	for New Castle County
STATE OF DELAWARE	§	ID No. 1206000145
	§	
Plaintiff Below-	§	
Appellee	§	

Submitted: October 16, 2013

Decided: December 9, 2013

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

On this 9th day of December 2013, it appears to the Court that:

(1) Defendant-below/Appellant Robert Worley appeals from a Superior Court jury conviction of Assault First Degree, Possession of a Deadly Weapon During the Commission of a Felony, and Possession of a Deadly Weapon by a Person Prohibited. Worley claims the trial court erred in denying his request for a missing evidence instruction regarding a surveillance video that the police failed to properly collect. We find no merit to Worley's claim and affirm.

(2) The charges arose from the stabbing of Raheem Green. On the night of the attack, Green was visiting his grandmother, whose home is adjacent to a liquor store. Green went to the liquor store to purchase lottery tickets for his grandmother

and later returned to the store to purchase a bottle of water. On his second trip to the store, Green saw Worley standing in front of an abandoned building. Worley yelled at Green and called him derogatory names. Worley followed Green into the liquor store and continued to harass him. The verbal confrontation became physical but was eventually broken up. Later, Green returned to the store after realizing he was missing his phone and pocketbook. Worley entered behind him and stabbed Green in his right side, puncturing a lung.

(3) The police investigation involved two separate photographic lineups wherein Green identified Worley as his attacker. Two other eyewitnesses also saw Worley enter the store holding a knife before the attack. One of those witnesses testified that he heard Worley say, "I'm going to kill this faggot."¹ The investigation also revealed surveillance footage from inside the liquor store that depicted the altercation but did not show faces clearly. Police officers were able to watch the video on the store's monitor but unable to make a copy after several attempts.

(4) At trial, Worley requested a missing evidence instruction based on the absent surveillance video. The trial court denied the request, finding that while the State had breached its duty to collect and preserve the video, Worley was not entitled to a favorable inference under the circumstances. The jury convicted

¹ Appellee's Ans. Br. Appendix at B21.

Worley of Assault First Degree and Possession of a Deadly Weapon During the Commission of a Felony. Worley was also convicted in a simultaneous bench trial of Possession of a Deadly Weapon by a Person Prohibited. He was sentenced as a habitual offender to 55 years in prison plus probation. This appeal followed.

(5) We review a trial court’s denial of a requested missing evidence jury instruction *de novo*.² A missing evidence instruction requires the jury to infer that, “had the evidence been preserved, it would have been exculpatory to the defendant.”³ Our analysis of whether the State’s failure to preserve evidence should entitle a defendant to a favorable inference instruction proceeds twofold.⁴ First, we determine whether the State breached its duty to preserve potentially exculpatory evidence, considering (1) whether the requested material, if in the possession of the State at the time of the request, would have been subject to disclosure under Superior Court Criminal Rule 16 or under *Brady v. Maryland*;⁵ (2) if so, whether the State had a duty to preserve the material; and (3) if there was a

² *McCrey v. State*, 941 A.2d 1019, 2008 WL 187947, at *2 (Del. 2008) (citing *Hendricks v. State*, 871 A.2d 1118, 1123 (Del. 2005)).

³ *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998).

⁴ *See Deberry v. State*, 457 A.2d 744, 750 (Del. 1983) (announcing a three-pronged analysis for when the State has breached its duty to preserve potentially exculpatory evidence); *Hammond v. State*, 569 A.2d 81, 86 (Del. 1989) (announcing a separate three-pronged analysis for the consequences that should flow from the State’s breach of duty to preserve evidence). *See also Lolly v. State*, 611 A.2d 956, 959–60 (Del. 1992) (rejecting the federal “bad-faith” standard for a missing evidence instruction, and reaffirming the “more exacting standard based on Delaware constitutional norms” under *Deberry* and *Hammond*).

⁵ 373 U.S. 83 (1963).

duty to preserve, whether the State breached that duty and what consequences should flow from that breach.⁶

(6) If the State is negligent in failing to preserve the material, we next turn to the consequences that should flow from the breach, and consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at trial to sustain the conviction.⁷

(7) The State has not disputed on appeal that it had a duty to collect and preserve the surveillance video and breached that duty in this case. The consequences that should flow thus depend upon the degree of negligence involved.⁸ Despite the State's negligence, the circumstances here did not warrant a missing evidence instruction. The video, even if preserved, would not have undermined the separate eyewitness identifications. This weighs against the requested instruction because it was not "of consequence" on the issue of identity.⁹ Moreover, there is ample other evidence to sustain Worley's conviction without the surveillance video and the testimony about it. The police investigation

⁶ *McCrey*, 2008 WL 187947, at *2 (citing *Wainer v. State*, 869 A.2d 328, 2005 WL 535010, at *2 (Del. 2005)).

⁷ *Id.* (citing *Hammond*, 569 A.2d at 86–87).

⁸ *See Hammond*, 569 A.2d at 86.

⁹ *Kiser v. State*, 769 A.2d 736, 740 (Del. 2001) (quoting *Getz v. State*, 538 A.2d 726, 731 (Del. 1988)).

developed around the identification of Worley by the victim and additional eyewitnesses. Although it would have been better for the police to collect and preserve the video for trial, the failure to preserve this particular evidence—which was not exculpatory—did not require a favorable inference instruction.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice