IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. L.D.G. (A Minor Child), b.d. 1/13/94, Appellant.	)	No. 65631-7-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: June 6, 2011

Becker, J. — A juvenile court found L.D.G. guilty of assault in the fourth degree based on an incident where L.D.G. pushed his teacher at school. On appeal, L.D.G. argues that the case against him should have been dismissed because the State violated due process by failing to preserve a surveillance video capturing the incident. We conclude that the State's failure to preserve the evidence did not violate due process because the exculpatory value of the video was not apparent and the State did not act in bad faith. Because L.D.G.'s challenge to the sufficiency of the evidence also fails, we affirm the conviction.

On November 13, 2009, Officer Eric Beseler went to Rainer Beach High School after it was reported that a teacher had been assaulted there. Officer Beseler spoke to the teacher, Michelle Jacobson, and took a statement from her.

After taking her statement, Officer Beseler interviewed L.D.G. by phone. According to Officer Beseler, L.D.G. admitted to shoving his teacher. Police arrested L.D.G. five days later. At trial, L.D.G. testified that he did not push Jacobson. He said he just grabbed her hands and gently moved her out his way after she aggressively approached him.

During his initial visit at the school, Officer Beseler viewed surveillance video of the incident. The school district later sent him an electronic copy of the video by e-mail. Officer Beseler did not save the copy, and it was automatically deleted by his e-mail program. The school had also sent him a physical copy of the video, but the physical copy was faulty and would not play. By this time, the original video had been destroyed. L.D.G. moved to dismiss the case for failure to preserve the evidence. The juvenile court denied the motion, concluding that the evidence was never in the State's control and the officer did not act in bad faith by failing to preserve the evidence.

Under both the Washington Constitution and the United States Constitution, due process requires that the State preserve material exculpatory evidence. State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). For evidence to be materially exculpatory, two requirements must be met: the evidence's exculpatory value must have been apparent before it was destroyed, and the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonable means. Wittenbarger, 124 Wn.2d at 475; California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413

(1984). If this test is not met and the evidence is only "potentially useful" to the defense, failure to preserve the evidence does not violate due process unless the defendant can show the State acted in bad faith. Wittenbarger, 124 Wn.2d at 477; Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). We review de novo a trial court's determination on whether missing evidence is materially exculpatory. State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001).

L.D.G. argues the video was materially exculpatory because it could have confirmed his version of the events and rebutted the testimony against him. He analogizes his case to another case involving the failure to preserve a video recording, City of Seattle v. Fettig, 10 Wn. App. 773, 519 P.2d 1002 (1974). In Fettig, this court reversed a driving while intoxicated conviction where the police failed to preserve a videotape of a defendant performing field sobriety tests. Fettig is unlike this case. There, the videotape was actually used at the defendant's bench trial in municipal court. When Fettig appealed the conviction to superior court, the case was tried de novo before a jury. Sometime in between, the State had negligently destroyed the tape. The defendant, however, was able to prove that the tape had exculpatory value through the testimony of the municipal court judge who had presided over the first trial and saw the tape. The judge testified that the video negated an impression of intoxication.

In contrast to Fettig, L.D.G. is unable to show that the video was

exculpatory. His contention that the video would confirm his version of events is speculative. In fact, it is more likely the video was inculpatory. Officer Beseler had reviewed the video. After doing so and talking to the teacher, he thought he had probable cause to arrest L.D.G. for assault. We conclude that the video was merely potentially useful to L.D.G.'s defense rather than materially exculpatory.

Because the video was not materially exculpatory, L.D.G. must show that the State acted in bad faith by failing to preserve the evidence. L.D.G. fails to show bad faith. The physical copy sent to the police was defective and would not play. Officer Beseler tried to retrieve an electronic copy from his e-mail, but it had been automatically deleted. He also tried to recover a copy from the school, but the video had not been preserved. This does not show bad faith. Thus, we affirm the trial court's denial of L.D.G.'s motion to dismiss.

L.D.G. also contends the State failed to prove that his touching of Jacobson was harmful or offensive, and therefore, there is insufficient evidence to support his fourth degree assault conviction. Assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury. State v. Tyler, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007). A touching or striking is offensive when it offends an ordinary person who is not unduly sensitive. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, at 547 (3d ed. 2008). The test for determining the sufficiency of the evidence is whether, after viewing the

evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). By claiming insufficiency of the evidence, a defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201.

We conclude sufficient evidence supports the conviction. Jacobson testified that she saw L.D.G. was late. L.D.G. was one of her students. She tried to hand him a hall pass so that L.D.G. could go straight to class rather than be held up for being late. L.D.G. responded by saying, "Get the fuck out of my way, bitch," and pushed her hard enough that she fell against a wall. While she said she was not physically hurt and did not wish to press charges, she felt shocked. An ordinary person would find being shoved into a wall offensive or harmful even if Jacobson did not. Thus when the evidence is viewed in the light most favorable to the State, sufficient evidence supports the conviction.

Finally, L.D.G. objects to the trial court's finding that he "fled the scene of the assault prior to police arriving." A court's findings of fact must be supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). L.D.G. correctly argues that the finding is not supported by any evidence. The only testimony about why L.D.G. left came from L.D.G. himself. And L.D.G. testified that school security told him to go home. We therefore have not considered it in determining the sufficiency of the evidence.

Affirmed.

Becker, J.

WE CONCUR:

Appelwick, J.

Grosse, J.