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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0884**

State of Minnesota,
Respondent,

vs.

Penny Renee Janorschke,
Appellant.

**Filed July 7, 2009
Affirmed
Minge, Judge**

Stearns County District Court
File No. K2-06-005058

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303-4701 (for respondent)

Cynthia J. Vermeulen, Vermeulen Law Office, P.A., 26 North Seventh Avenue, St. Cloud, MN 56303 (for appellant)

Considered and decided by Minge, Presiding Judge; Toussaint, Chief Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges her conviction of obstructing legal process with force in violation of Minn. Stat. § 609.50, subds. 1(2), 2(2) (2006), arguing that the district court erred in denying the defense motion to dismiss the charges on the basis that certain squad car video recordings had been destroyed and that the evidence is not sufficient to support the conviction. We affirm.

FACTS

On October 20, 2006, while being transported to the Stearns County jail, appellant Penny Janorschke became highly disruptive. The squad car was being driven by Sartell Police Officer Kari Bonfield. With the officer in the front seat was a citizen in a ride-along program. Handcuffed in the back seat, appellant was experiencing mood swings that varied from crying to screaming at the officer. When appellant began to strike the Plexiglas divider, Officer Bonfield instructed appellant to calm down, but she continued to hit the divider. After Officer Bonfield stopped the squad car, appellant thrashed and kicked about. Officer Bonfield then called for assistance and removed appellant from the car.

At trial, Officer Bonfield testified that she had escorted appellant to the rear of the squad car and that appellant was facing the trunk. Bonfield testified that appellant then screamed, swung her head backwards hitting her (Bonfield) in the face, and swung her handcuffed arms around, hitting her (Bonfield) multiple times on the head. The officer further testified that, after she forced appellant to the ground, appellant grabbed her

(Bonfield's) hair and pulled. Eventually, Officer Bonfield and the ride-along citizen restrained appellant until backup units arrived. The citizen characterized appellant's conduct at the back of the squad car as squirming, stated that appellant struck Officer Bonfield with her hands and "spun around," hitting Officer Bonfield's head with her elbow, and generally corroborated Officer Bonfield's testimony.

Appellant's testimony differed from the accounts of Officer Bonfield and the citizen. Appellant testified that, when the officer brought her to the back of the squad car, she told the officer that she was in pain, that she was scheduled for back surgery, and that the officer was hurting her. Appellant admitted making contact with the officer but testified that she was in pain and did not intend to strike the officer. Officer Bonfield's car was not equipped with a video-recording device.

After Officer Bonfield and the citizen had pinned appellant on the ground, five squad cars arrived on the scene. The first two squad cars were not equipped with a video-recording device, but the third squad car was so equipped. In preparation for trial, no video recording was found from the third squad car, and it could not be determined if any video was ever recorded by that squad car.

The fourth and fifth squad cars to arrive also contained video-recording equipment. The recording equipment in the fourth squad car was apparently operational. However, the tape was erased 91 days after the incident, in accordance with department protocol. A review of the video recording from the fifth squad car indicated that it did not capture any activity at the scene of the incident.

On October 23, 2006, appellant was charged with third-degree assault, fourth-degree assault, and obstructing legal process with force. Appellant's original counsel served the state with a discovery demand on November 6, 2006, requesting 12 forms of evidence including "[a]ny audio tapes, videotapes or photographs." On December 4, 2006, appellant discharged her original attorney and on December 22, 2006, retained new defense counsel. On February 9, 2007, defense counsel filed a request for disclosure including "all in squad videos." By that date, the fourth squad car's video had been destroyed.

Prior to trial, appellant filed a motion in limine to suppress testimony regarding the alleged assault or dismiss the complaint due to the "[s]tate's act of destroying the video tape without notice to [appellant]." The district court denied appellant's motion to dismiss and deferred appellant's motion for sanctions and a curative jury instruction. At trial, the district court accepted as a sanction one of appellant's requests, which was to exclude direct prosecution testimony about the period when the fourth squad car was at the scene and its recording equipment may have been operational. The district court reasoned that this limited sanction was appropriate because (1) the conduct underlying the criminal charge was prior to the time when that recording would have occurred; and (2) the principal prejudice to appellant from the loss of the recording was information that may have been used to cross-examine the state's witnesses about post-assault activity.

Before trial, the third-degree assault charge was dismissed. The jury acquitted appellant of fourth-degree assault but convicted her of obstructing legal process with force. This appeal follows.

DECISION

I.

The first issue is whether the destruction of any squad car video tapes violated appellant's right to due process. When constitutional issues involving due process are raised, this court reviews the district court's legal determinations de novo and defers to the district court's factual findings unless they are clearly erroneous. *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

In a criminal case, the state has a duty to disclose "any evidence within its possession or control that 'tends to negate or reduce the guilt of the accused as to the offense charged.'" *State v. Engle*, 731 N.W.2d 852, 857 (Minn. App. 2007) (citing Minn. R. Crim. P. 9.01, subd. 1(6)), *affirmed* 743 N.W.2d 592 (Minn. 2008); *see also Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). This court has held that, when a state violates discovery rules through intentional or bad-faith destruction of potentially exculpatory evidence, the defendant's constitutional due-process rights are implicated. *Engle*, 731 N.W.2d at 857.

If the government cannot deliver the evidence to the defendant because it is lost or destroyed, an appellate court examines the circumstances of the loss. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337 (1988); *California v. Trombetta*, 467 U.S. 479, 486-87, 104 S. Ct. 2528, 2532-33 (1984); *Engle*, 731 N.W.2d at 857. This court has identified three factors that an appellant must show before we will reverse a conviction on the basis of the destruction of evidence: (1) the destroyed evidence had apparent exculpatory value; (2) comparable evidence is unattainable by other reasonably

available means; and (3) and the state intentionally destroyed or allowed the destruction of the evidence in bad faith. *Engle*, 731 N.W.2d at 857. The defendant bears the burden of demonstrating bad faith on the part of the police. *Id.*; see also *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337.

With respect to the first factor, exculpatory value, appellant argues that even the after-the-event recordings at the crime scene are important because contemporaneous statements and actions of the primary witnesses are the most accurate indication of what had just occurred, and this information may be exculpatory. However, there is no evidence or indication that any such exculpatory conduct occurred or could have been picked up on squad-car video. Appellant could have questioned witnesses to attempt to identify such information. She did not do so. On this record, any exculpatory value of the video recordings is conjecture.

With respect to the second factor, alternate sources of the missing evidence, the record before us is relatively bare. We have a factual dispute, varying testimony, and no evidence of what was on the recording. As just observed, there was a possibility of questioning witnesses as an alternative source. This was not done. To minimize the prejudice of the missing tapes, the district court, at appellant's request, prohibited the prosecution from presenting direct testimony from its witness about the events that occurred at the time that the squad cars with the video recording capability were at the scene. In contrast, appellant was allowed to testify and to cross-examine witnesses about the entire sequence of events. Because nothing was developed by appellant to fill in what might have been on the tapes, this factor is essentially unaddressed.

Finally, appellant argues that bad faith is implicit and cites *Strickler v. Greene*, 527 U.S. 263, 265, 119 S. Ct. 1936, 1941 (1999). However, *Strickler* dealt with a prosecutor's failure to disclose important exculpatory evidence and did not deal with the failure to preserve evidence. *Id.* This court has distinguished between the state's failure to disclose and the state's failure to preserve evidence. *Engle*, 731 N.W.2d 856. In order to establish a due-process violation when the state loses, destroys, or otherwise fails to preserve evidence, appellant must demonstrate that the state acted in bad faith. *Youngblood*, 488 U.S. at 57-58, 109 S. Ct. at 337; *Engle*, 731 N.W.2d at 857. The Supreme Court in *Youngblood* placed this burden on the defendant in part because it has been unwilling "to read the 'fundamental fairness' requirement of the Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." 488 U.S. at 58, 109 S. Ct. at 337 (citation omitted).

Here, the record indicates that the policy to erase tapes was well-established. Although it should have been administered in accordance with the prosecution's discovery obligations, the policy itself was adopted in good faith. There is no showing that the sheriff's office or the county attorney acted in bad faith. The destruction of the tapes was apparently an error. Because nothing in the record indicates bad faith on the part of the state and appellant has advanced no argument that would support a finding of bad faith, we affirm the district court's conclusion that the destruction of any video evidence in this instance did not violate appellant's right to due process.

II.

The second issue is whether appellant's conviction was supported by sufficient evidence. This court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

A person is guilty of obstructing legal process when that person intentionally "obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties." Minn. Stat. § 609.50, subd. 1(2). The offense is a gross misdemeanor "if the act was accompanied by force or violence or the threat thereof." *Id.*, subd. 2(2); *see* Minn. Stat. § 609.02, subd. 4 (2006) (defining gross misdemeanor).

Appellant first argues that there was no evidence presented at trial that would support a conclusion that she intentionally struck the officer. The testimony of Officer Bonfield set forth previously in this opinion was sufficient to allow the jury to reasonably infer that the repeated nature of appellant's actions were not inadvertent but instead evidenced a concerted attempt by appellant to resist Officer Bonfield's attempts to subdue her.

The appellant's second argument in support of her claim of insufficient evidence is based on the jury's acquittal of the assault charge. Whether verdicts are legally inconsistent is a question of law, which this court reviews de novo. *State v. Laine*, 715

N.W.2d 425, 434-35 (Minn. 2006). Here, an acquittal on the assault charge does not logically preclude a finding of guilt under the charge of obstruction of legal process with force. To find the defendant guilty of assault, the jury would have had to find that appellant attempted to inflict or intentionally inflicted bodily harm on the officer. Minn. Stat. § 609.2231, subd. 1 (2006); 10 *Minnesota Practice*, CRIMJIG 13.22 (2006) (defining elements of fourth-degree assault). Obstruction of legal process with force does not require that appellant intended to inflict bodily harm on the officer. Minn. Stat. § 609.50, subd 1(2).

Because it is the prerogative of the jury to evaluate the credibility of testimony and because the evidence is sufficient to allow the jurors to convict for obstruction of legal process with force, appellant's claim of insufficient evidence fails.

Affirmed.

Dated: