NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LINDSEY MELVIN DUNY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12136 Trial Court No. 3AN-12-11248 CR MEMORANDUM OPINION No. 6516 — August 23, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack Smith, Judge.

Appearances: Andrew Ott, Johnson Kamai & Trueb, LLC, Kodiak, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

Judge WOLLENBERG.

After a jury trial, Lindsey Melvin Duny was convicted of second-degree burglary, third-degree criminal mischief, and fourth-degree theft for breaking into a liquor store in Anchorage and stealing several bottles of alcohol.[1] On appeal, Duny

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[1] Duny was also convicted of first-degree criminal trespass for separately breaking into (continued...)

raises several challenges to his convictions. First, Duny argues that the State presented insufficient evidence to support his burglary and criminal mischief convictions. Second, Duny argues that the trial court abused its discretion in declining to instruct the jury that it should presume certain lost or destroyed documents were favorable to Duny.[2] Finally, Duny argues that the trial court erred in failing to dismiss one of the prospective jurors for cause.

For the reasons explained below, we reject Duny's arguments and affirm his convictions.

Factual background

Because Duny challenges the sufficiency of the evidence to support his burglary and criminal mischief convictions, we present the following background facts in the light most favorable to upholding the jury's verdict.[3]

At 7:18 a.m. on October 27, 2012, surveillance cameras at a Brown Jug liquor store in Anchorage captured video of a break-in. The front window of the store was smashed with a rock and two male individuals entered the store through the broken window. The men stole several bottles of alcohol and then departed. One person wore a jacket with distinctive white underarm patches and tan pants. The second person wore dark clothing, including a gray jacket, and the sole of his shoes had a white streak. Because of the grainy quality of the video and the fact that both individuals had hoods pulled up on their heads, the police could not see distinct facial features on either person.

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[1] (...continued)
his friend's home.

[2] *See Thorne v. Dep't of Pub. Safety*, 774 P.2d 1326 (Alaska 1989).

[3] *See, e.g.*, *Newsom v. State*, 199 P.3d 1181, 1188 (Alaska App. 2009).

Several police officers responded to the scene. The police noticed what appeared to be fresh blood on the broken glass and a trail of blood drops on the floor inside.

As the police were completing the investigation at the store, they received a request to provide medical assistance at a home that was a little over a half mile away. The dispatch report indicated that an intoxicated individual had a cut on his finger.

Just after 9:00 a.m., the police arrived at the home. The owner, Danny Montgomery, reported that approximately thirty to forty-five minutes earlier, Lindsey Duny and Duny's friend, Stephen Joseph, had broken into his home. Montgomery awoke to find them fighting in his living room. Although Duny was a friend of Montgomery's and had a standing invitation to visit, Montgomery had locked the door the prior evening and was unsure how Duny had entered. Montgomery observed that Duny was intoxicated, and he made Duny and Joseph leave.

The police found Duny hiding in a nearby shed. Duny had a cut on his right hand that was actively bleeding, and one of the investigating officers observed that his clothing and body type were consistent with the images of one of the men in the Brown Jug video. As police led Duny to the patrol car, Duny asked the officers to retrieve the gray jacket that was lying outside the shed. Duny did not make any other statements to the police.

In the meantime, another police officer had stopped at a corner near the Brown Jug to investigate a possible suspect in the Brown Jug break-in. The suspect, an adult male, was wearing gym shorts and a dark jacket with white underarm patches. The police found a light-colored pair of pants covered in blood on the ground. The police also retrieved a sealed bottle of R&R liquor from the man's jacket sleeve. The police identified the man as Stephen Joseph.

The State charged Duny with second-degree burglary, third-degree criminal mischief, and fourth-degree theft in connection with the Brown Jug incident (as well as first-degree criminal trespass for unlawfully entering Montgomery's home).[4] The trial court instructed the jury that it could find Duny guilty of criminal mischief either as a principal or as an accomplice. The jury convicted Duny of all counts.

Sufficient evidence supports Duny's convictions for burglary and criminal mischief

On appeal, Duny challenges the sufficiency of the evidence to support his second-degree burglary and third-degree criminal mischief convictions because "he was never clearly identified as one of the intruders."[5] Duny notes that none of the officers could see the faces of the suspects because of the poor quality of the video and that Duny's clothing was not distinctive. Duny also argues that he could have sustained his finger injury during the altercation at Montgomery's home, particularly since it was still actively bleeding two hours after the Brown Jug burglary.

While the evidence against Duny was largely circumstantial, a juror could reasonably infer Duny's participation from the evidence presented. First, Duny was seen with Joseph at Montgomery's home on the morning of the burglary. Anchorage Police Officer Kyle Hemmesch testified that Montgomery's home was within "easy walking distance" of the Brown Jug. The police later found Joseph near the Brown Jug, wearing a jacket with white underarm patches, sitting near blood-soaked tan pants, and carrying a sealed bottle of R&R. Duny acknowledges that these facts support Joseph's

[4] AS 11.46.310; former AS 11.46.482(a)(1) (2012); former AS 11.46.150 (2012); and AS 11.46.320(a)(2), respectively.

[5] At sentencing, the trial court merged the jury's theft verdict into the burglary conviction.

involvement in the burglary. Based on the evidence that Duny and Joseph were together at Montgomery's home shortly after the Brown Jug burglary, jurors could reasonably infer that Duny was the second individual involved in the burglary.

Second, the blood on the broken glass at the Brown Jug suggested that at least one of the burglars had cut himself on the store window. When the police found Duny, his finger was cut and actively bleeding. While it is possible that Duny cut his finger while fighting with Joseph, as Duny alleges, the law requires us to view the evidence in the light most favorable to upholding the jury's verdict. Based on the evidence presented, the jury could reasonably conclude that Duny cut his finger while breaking into the Brown Jug.

Third, having reviewed the surveillance video and still-frame photographic exhibits, we acknowledge that the emblems the police attributed to the second suspect (Duny) — a patch on the sleeve of the person's jacket, a logo on the back left pocket of the person's jeans, and an emblem on the back of the person's shoes — are not necessarily obvious from the video. But the jurors could independently view the video and Duny's gray jacket — which was collected at the scene and admitted into evidence — and reasonably conclude that some or all of these identifying features existed and matched Duny. They could also credit the officers' testimony about the consistency of Duny's clothing with the second suspect in the video.[6]

Taking these facts together, jurors could reasonably infer that Joseph and Duny were the two men who burglarized the Brown Jug. And although the evidence did not clearly establish who threw the rock into the Brown Jug window, jurors could

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[6] *See Ratliff v. State*, 798 P.2d 1288, 1291 (Alaska App. 1990) (noting that "the weight and credibility of evidence are matters for the jury to consider in reaching a verdict, not for the reviewing court to decide in ruling on the legal sufficiency of the evidence").

reasonably conclude that Duny was guilty of criminal mischief either personally or though Joseph's actions.[7]

Duny also points out that the police failed to analyze and compare the blood at the Brown Jug with DNA samples from either Duny or Joseph. While the police could have done more, a fair-minded juror exercising reasonable judgment could find that the State had met its burden of proving Duny's guilt beyond a reasonable doubt.[8]

We therefore conclude that the evidence was sufficient to support Duny's convictions for second-degree burglary and third-degree criminal mischief.

The trial court did not abuse its discretion in declining to give a Thorne instruction regarding the Brown Jug incident report

At trial, Brandon Erickson, Brown Jug's regional loss prevention manager, testified that on the day of the break-in, he wrote "an internal security report" documenting the burglary and the resulting damage. Erickson explained that he had misplaced the report and could not find it.

Duny's attorney asked the court for a "*Thorne* instruction" — an instruction advising the jury to presume the missing report was favorable to Duny.[9] The prosecutor responded that the police had no duty to collect the report and that the police were unaware of the report prior to Erickson's testimony. The court declined to give the requested instruction, concluding that the police did not have an affirmative obligation to collect the report. Duny now challenges the trial court's ruling.

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[7] *See Andrew v. State*, 237 P.3d 1027, 1040-41 (Alaska App. 2010) (recognizing that defendant's guilt may be established by the defendant's own conduct, by the conduct of other people for whom the defendant is vicariously liable, or by both).

[8] *See Eide v. State*, 168 P.3d 499, 500-01 (Alaska App. 2007).

[9] *See Thorne*, 774 P.2d at 1331-32.

We reject Duny's argument for two reasons.

First, the State generally does not have a duty to collect all evidence related to a crime, and the State's duty to preserve evidence applies only to evidence it has actually gathered.[10] Here, the Brown Jug report was in the hands of a third party, and the trial court found that the police were unaware of the existence of the report prior to Erickson's testimony. Duny speculates that the State could have learned of the existence of the report during trial preparation. As he acknowledges, however, there is no testimony on this point and no evidence in the record contradicting the trial court's finding. There is also no evidence that Duny's attorney did not have the same opportunity as the government to contact Erickson and obtain the report (at least before Erickson misplaced it).[11] Given the facts of this case, we agree with the trial court that the government had no independent duty to collect the incident report.

Second, even if the police had a duty to collect the report, it is not clear how the absence of the report prejudiced Duny at trial. While Erickson was in a better position than the officers to assess the value of the property taken and the cost of the damages, Duny's sole defense at trial was identity; he did not contest the value of the property taken or the amount of the damages. And, like the police officers, Erickson did not personally observe the burglary.

Accordingly, we uphold the trial court's decision to deny the defense request for a *Thorne* instruction for the lost incident report.

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[10] *Selig v. State*, 286 P.3d 767, 772 (Alaska App. 2012).

[11] *Cf. Carter v. State*, 356 P.3d 299, 301 (Alaska App. 2015) (holding that duty to collect evidence does not apply "where the evidence is in the hands of a third party, where the defendant knows that the evidence exists (and understands the importance of it), where the evidence is not ephemeral (*i.e.*, its probative value will not be impaired by a short delay in collecting it), and where the defendant has essentially the same opportunity as the government to subpoena or otherwise obtain the evidence").

The trial court did not abuse its discretion in declining to give a _*Thorne*_ *instruction regarding Officer Hemmesch's field notes*

During cross-examination of two of the police officers, Duny's attorney inquired as to whether they take field notes. Anchorage Police Officer Mischa Sorbo testified that he generally takes shorthand notes to help jog his memory when he later prepares his reports. Officer Sorbo testified that he generally keeps his notes. At the defense attorney's request, the trial court ordered Officer Sorbo to locate and disclose them. Officer Sorbo produced his notes, and after reviewing them, the defense attorney declined to recall Officer Sorbo to testify about them.

Anchorage Police Officer Kyle Hemmesch testified that he takes notes but has a practice of shredding his notebook after the notebook is full and after his reports "clear." Officer Hemmesch testified that he "sometimes" transfers his notes into his report, depending on the type of call to which he has responded. He explained that he transfers the notes if they are the type of notes intended for the report. He also stated that there is no reason he would purposely omit something. He did not provide copies of his notes to the prosecutor in this case prior to destroying them.

Duny's attorney requested a *Thorne* instruction as to Officer Hemmesch's destroyed field notes. The attorney argued that the absence of the field notes precluded him from knowing whether Officer Hemmesch's report contained all the information in the notes.

The trial court found the State had a duty to preserve the field notes and expressed concern about the failure to keep the notes, which the court viewed as part and parcel of the complete police report. The court concluded, however, that an adverse inference instruction was not warranted due to the absence of bad faith by the State and the lack of ascertainable prejudice to Duny.

On appeal, Duny challenges the trial court's denial of his requested *Thorne* instruction. In response, the State does not directly address the trial court's ruling that Officer Hemmesch had a duty to preserve his field notes. Instead, the State argues that, in the absence of bad faith on the part of the officer and in the absence of any reason to believe the field notes were important to Duny's case and that their loss was prejudicial, the trial court correctly declined to instruct the jury to presume that the officer's field notes would have been favorable to Duny.

In determining the appropriate sanction for the State's failure to preserve evidence in its possession, a court must balance four factors — "the degree of culpability on the part of the state, the importance of the evidence lost, the prejudice suffered by the accused, and the evidence of guilt adduced at the trial or hearing."[12] The Alaska Supreme Court has explained that "[w]here the evidence in question was destroyed in bad faith or as part of a deliberate attempt to avoid production, sanctions will normally follow."[13] But "where it appears the evidence was lost or destroyed in good faith, the imposition of sanctions will depend on the degree to which the defendant has been prejudiced."[14] We evaluate a trial judge's denial of a *Thorne* instruction for an abuse of discretion.[15]

Duny argues that this Court should construe Officer Hemmesch's destruction of his field notes as an act of bad faith. In particular, Duny argues that Officer Sorbo's production of his field notes demonstrates that the Anchorage Police

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[12] *Thorne*, 774 P.2d at 1331.

[13] *Putnam v. State*, 629 P.2d 35, 43 (Alaska 1980), *overruled on other grounds by Stephan v. State*, 711 P.2d 1156, 1163 (Alaska 1985).

[14] *Id.*

[15] *Riney v. State*, 935 P.2d 828, 840 (Alaska App. 1997).

Department (APD) did not have a policy requiring destruction. He therefore argues that Officer Hemmesch acted independently and that this action constituted an act of bad faith.

The trial court agreed that APD did not have a policy of destruction or retention regarding field notes, instead leaving the decision up to each officer. But while the trial court expressed displeasure at the absence of a uniform policy at APD requiring officers to preserve their notes, the court concluded that Officer Hemmesch's actions were not done in bad faith since there was no clear directive to him to retain the notes.

Moreover, Officer Hemmesch testified that he regularly shreds his notebooks once they are full and after his reports "clear." Thus, there is no indication that Officer Hemmesch destroyed the field notes in this case "as part of a deliberate attempt to avoid production" of relevant evidence.

We review a trial court's finding of good or bad faith for clear error.[16] Here, the trial court's finding that Officer Hemmesch did not act in bad faith is not clearly erroneous.

Duny argues that, even absent bad faith, the field notes were important evidence and he was prejudiced by their destruction, particularly in light of his identity defense. But Duny's arguments regarding prejudice are conclusory. And given the evidence and investigation in this case, it is unclear how the absence of the field notes truly prejudiced Duny.

Three officers testified at trial. Each of these officers responded to the Brown Jug break-in and watched the surveillance video. None of the officers, including Officer Hemmesch, personally observed the burglary. Their conclusions regarding

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[16] *Stover v. State*, 1996 WL 33686815, at *5 (Alaska App. June 26, 1996) (unpublished) (citing *Long v. State*, 772 P.2d 1099, 1101 (Alaska App. 1989); *Wilburn v. State*, 816 P.2d 907, 911 (Alaska App. 1991)).

Duny's participation in the Brown Jug burglary were based primarily on a comparison of the Brown Jug security video and their observations of Duny and Joseph at the time of their arrests. The jury itself could compare the security video and still-frame shots from the video with photographs of Duny and Joseph at the time they were taken into custody — along with the gray jacket retrieved from the site of Duny's arrest — and independently assess whether the defendants were properly identified.

Moreover, Officer Sorbo responded both to the Brown Jug and to Montgomery's home with Officer Hemmesch. Officer Sorbo provided his field notes to Duny's attorney, and after reviewing the notes, Duny's attorney declined to recall him for questioning. The absence of materially helpful information in Officer Sorbo's notes undermines Duny's argument regarding the importance of Officer Hemmesch's notes.

Accordingly, we conclude that the trial court did not abuse its discretion by declining to give a *Thorne* instruction regarding the destroyed field notes.

The denial of Duny's challenge of a juror for cause does not constitute reversible error

Duny's final claim is that the trial court erred by declining to dismiss a juror for cause. The prospective juror, B.K., was a store owner whose business had been the target of theft and other property crimes. During initial voir dire, the court asked B.K. whether she could separate her personal experiences from the evidence in this case. B.K. responded that she could.

Duny's attorney later asked B.K. whether the fact that Duny's case involved a commercial burglary resonated with her as a business owner. B.K. responded, "Quite honestly, yes." Defense counsel then asked how she would feel if APD told her that a crime committed at her store was not a priority. B.K. stated that she would be "[a] little frustrated."

Based on these answers, Duny's attorney asked the court to dismiss B.K. for cause. The court declined to do so based on B.K.'s "overall responses." Duny's attorney then exercised a peremptory challenge to remove B.K. from the jury panel. The defense attorney subsequently exhausted his eleven peremptory challenges, but he did not request an additional peremptory challenge as a remedy for having used one to remove B.K.

On appeal, Duny challenges the trial court's refusal to dismiss B.K. for cause. Given B.K.'s responses, the judge's ruling appears to be a reasonable exercise of discretion.[17] But even assuming the trial court erred in denying Duny's challenge of B.K., Duny would not be entitled to reversal of his convictions.

In *Minch v. State*, this Court held that to successfully appeal the denial of a challenge for cause, a party must establish both that the trial judge erred in denying the challenge for cause and that there is "some reason to believe one or more of the jurors who decided the case were, in fact, not fair."[18] Here, B.K. did not sit on Duny's jury, and Duny makes no argument that the jurors who decided his case were unable to be fair. The only prejudice Duny alleges is that the trial court's ruling compelled him to use a peremptory challenge and that another peremptory challenge might have resulted in an even fairer jury. Under *Minch*, the possibility that another peremptory challenge might have been used on another juror is insufficient to establish prejudice.[19]

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[17] *Hammock v. State*, 52 P.3d 746, 749-50 (Alaska App. 2002) (reviewing denial of challenge for cause for an abuse of discretion).

[18] *Minch v. State*, 934 P.2d 764, 770 (Alaska App. 1997).

[19] *Id.* at 769-70.

Conclusion

The judgment of the superior court is AFFIRMED.