FILED
SEP 02 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-173 / 92-790

000935

STATE OF IOWA,

Appellee,

vs.

TYRONE LEO SHIVERS,

Appellant.

Appeal from the Iowa District Court for Webster County, Mark S. Cady, Judge.

Tyrone Leo Shivers appeals his convictions, following a jury trial, of arson in the first degree; burglary in the second degree; and theft in the first degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, James J. Koll, County Attorney, and Cynthia Goins Voorde, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, P.J. 000336

The defendant, Tyrone Leo Shivers, appeals his convictions, following a jury trial, of first-degree arson in violation of Iowa Code section 712.2 (1991); second-degree burglary in violation of Iowa Code section 713.5 (1991); and first-degree theft in violation of Iowa Code section 714.2 (1991). Shivers contends the district court erred in: (1) failing to suppress evidence obtained during a tape-recorded interview, after an officer allegedly destroyed the tape, which resulted in a denial of due process; and (2) failing to grant his motion for judgment of acquittal based on the sufficiency of evidence.

On December 3, 1991, a security guard for the Warden Plaza and Wahkonsa Manor in Fort Dodge was responding to a fire alarm on the first floor of Wahkonsa Manor when he surprised three black males carrying a large cardboard box between the buildings. The men dropped the box and ran. The guard, Mr. Strauss, then located the fire and called the fire department. When Strauss returned, he noticed the box was gone. The fire was at Eddie Quinn's clothing store which appeared to have been broken into, to have had clothing stolen from it, and to have been set on fire intentionally.

On December 19, 1991, the State charged Shivers and two codefendants with arson in the first degree, burglary in the first degree and theft in the first degree. Shivers joined in a codefendant's motion to sever trials which was granted.

A recorded interview had taken place between Shivers and officers, so Shivers filed a motion to produce any recorded statements made by him. The tape was not produced. During depositions, two weeks later, Officer McCarville indicated he had intentionally failed to transcribe the interview because the tape was not concise and he did not want to overburden the secretarial staff. Instead, McCarville made a typed summary of the tape. Shivers still requested a copy of the tape. McCarville then said the tape had broken two weeks earlier, but that he would produce it for repair. Some time thereafter, McCarville told Shivers the tape was lost or discarded. Shivers then filed a motion to suppress evidence obtained during the recorded interview based on the destruction of the tape.

At the suppression hearing the officer said he had left the tape unlocked on the top of his desk because he had "to go to the bathroom or something" in a hurry. McCarville could not recall whether the tape remained on the desk when he returned. Further, McCarville stated that although the usual practice involved transcribing tapes, doing so was not the policy. He said that during the interview, Shivers told him that Shivers was in the area on the night of the incident, but was not involved in the burglary or arson. Shivers further stated he did not receive any proceeds from the theft.

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Shivers had told McCarville that Shivers was coming home from dinner at the Beer Garden when he came across Jerry White (also charged with the crime) carrying a box of clothing. Jerry asked for assistance, and Shivers helped take the boxes to an apartment or storage room in Wahkonsa Manor. Officer Bockelmann then testified that he had never failed to transcribe tapes of interviews due to the length of the interview or based upon a lack of secretarial personnel. In contrast to Officer McCarville's assertions, the evidence indicated it would be unusual for an officer to fail to have a taped interview transcribed.

Shivers testified that during the interview he had provided exculpatory information concerning the identity of the people responsible and stated he was just a bystander who helped carry some boxes for a friend. The court denied the motion to suppress.

At trial, Strauss, the security guard, testified that although he could positively identify the other two men, he could not positively identify Shivers even though he thought Shivers was present at the scene. McCarville also testified about his interview with Shivers. Whiting, the clothing store manager, testified to finding a ring on top of a pair of pants after the incident. Jodi Mericle, Shivers' girlfriend, testified to buying the ring for Shivers a month prior to the incident. Two witnesses later testified, without refutation, that Shivers had lost the ring prior to the incident.

Finally, the State introduced an envelope displaying a spot of blood. It was found on top of a desk on the second floor of the store; it had been there for approximately two months. The blood was analyzed and determined to be the same blood type group as Shivers' group, type B. Shivers then argued that at least twenty percent of the black population and eleven percent of the white population are also type B blood group and that several people, including firemen, had been in the same area where the envelope was found.

The court granted Shivers' motion for judgment of acquittal concerning the charge of burglary in the first degree due to lack of evidence. The court denied the motion with respect to the charge of burglary in the second degree and the other offenses and submitted a spoliation instruction concerning the destroyed tape. Shivers was ultimately found guilty. The district court denied his motion for new trial, entered judgment, and sentenced Shivers to sentences not to exceed twenty-five years on the arson conviction and not to exceed ten years each on the burglary and theft charges. Shivers appeals.

Shivers argues the tape of his interview was destroyed in bad faith resulting in substantial prejudice. He also contends insufficient evidence exists to link him to the crimes. The State questions the admissibility of the tape, arguing the tape was not direct physical evidence and was therefore immaterial. We affirm.

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Since the defendant asserts denial of his right to due process, an alleged violation of a basic constitutional safeguard, the applicable standard of review is de novo. We must therefore conduct an independent evaluation based on the totality of the circumstances. State v. Hulbert, 481 N.W.2d 329, 334 (Iowa 1992); State v. Maniccia, 355 N.W.2d 256, 258 (Iowa App. 1984).

> To prove a due process violation based on destruction of evidence, the defendant must show (1) a proper defense request for the evidence; (2) that the evidence was material; and (3) that the evidence would have been significantly favorable to the defendant. State v. Brown, 337 N.W.2d 507, 511 (Iowa 1983). Crucial to this case is the further rule that the spoliation inference is inappropriate unless the destruction is intentional. State v. Langlet, 283 N.W.2d 330, 333 (Iowa 1979). Only a deliberate act supports the rationale underlying the rule: that destruction serves as an "admission by conduct of the weakness of one's case." Id. See also Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988) (distinguishing state's failure to disclose material exculpatory evidence from failure to preserve potentially useful evidence, Court held "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.")

State v. Hulbert, 481 N.W.2d 329, 334 (Iowa 1992). See also State v. Dulaney, No. 91-826, slip op. (Iowa Dec. 23, 1992) (no due process violation from good faith destruction of blood specimen in vehicular homicide case); State v. Craig, No. 91-1637, slip op. (Iowa Oct. 21, 1992) ("if the exculpatory value of the lost evidence is suitable for evaluation by a fact finder, a due process violation will be found upon a showing that the evidence was exculpatory and its destruction was deliberate.")

In the present case, the record does not support Shivers' contention that Officer McCarville--or anyone else from the police department--acted in bad faith in failing to preserve the potentially useful tape. Accordingly, Shivers' due process rights were not violated as a result of the district court's refusal to suppress evidence obtained during the tape-recorded interview.

In fact, the district court gave the defendant the benefit of the doubt regarding the uncertainty as to what particular evidence might have been contained on the lost tape. This was done when the court administered the spoliation instruction to the jury concerning the lost tape despite the fact the court was not required to do so under the facts of this case. The spoliation inference is appropriate when the destruction is intentional. State v. Langlet, 283 N.W.2d 330, 333 (Iowa 1979).

Here, when ruling on the defendant's motion to suppress, the district court specifically found that Officer McCarville did not intentionally destroy the tape. Nonetheless, the court elected to give the spoliation instruction in order to allow the jury to determine what effect, if any, the missing tape should have on the outcome of the trial. By administering this spoliation instruction, the uncertainty as to what evidence was contained on the tape was turned to Shivers' advantage in that he was permitted the possibility of a favorable inference from the jury regarding the missing evidence.

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Over the State's objection, the court gave the following spoliation instruction:

> If you find that a tape of Defendant's statements existed and the State knowingly and intentionally destroyed the tape, you may, but are not required to, conclude that the information contained on the tape would be unfavorable to the State and favorable to the Defendant.

Furthermore, the record does not support defendant's contention that the evidence contained on the tape established an unavoidable possibility that the tape would have been significantly favorable to the defendant. See State v. Maniccia, 355 N.W.2d 256, 259; State v. Brown, 337 N.W.2d 507, 511 (Iowa 1983). To the contrary, the record indicates that after Shivers read the summary of the taped interview prepared by Officer McCarville, Shivers indicated the only matter discussed at the interview that was not contained in the summary regarded drug dealings. Shivers has failed to indicate the content of any other missing information on the tape sufficient to meet the above standard. For all of these reasons, we conclude Shivers was not denied due process.

Shivers also contends the court erred in failing to grant his motion for judgment of acquittal based on the insufficiency of the evidence to support his convictions. In reviewing the sufficiency of the evidence to support a conviction, this court reviews all evidence in the light most favorable to the verdict to determine whether the record contains substantial evidence to support a guilty

verdict, such that a rational fact finder could be convinced of the defendant's guilt beyond a reasonable doubt. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1981).

Having thoroughly reviewed the record, we conclude substantial evidence exists to support all of Shivers' convictions. Accordingly, we affirm all of the defendant's convictions.

AFFIRMED.