FILED
MAY 31 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed May 31, 1979
vs.	)	
MICHAEL LANGLET,	)	130 62256
Appellant.	)	

Appeal from Jasper District Court - A. C. Omer, Judge.

Defendant appeals from his O.M.V.U.I. conviction, alleging inter alia error in the trial court's failure to instruct the jury concerning the State's failure to produce certain evidence. - Reversed and remanded.

Patrick H. Payton, of Payton & Hearn, Des Moines, for Appellant.

Thomas J. Miller, Attorney General of Iowa, Ann Fitzgibbons, Assistant Attorney General, and R. Steven Johnson, Jasper County Attorney, for Appellee.

Heard by Oxberger, C. J., and Donielson, Snell and Johnson, JJ. Carter, J., takes no part.

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Defendant appeals from his conviction of operating a motor vehicle while under the influence of an alcoholic beverage in violation of section 321.281, The Code 1977. Defendant alleges several errors. We reverse on the issue of the State's failure to produce evidence exculpatory to the defendant.

Defendant was arrested in Jasper County on February 16, 1978, and charged with the above crime. Following arrest, defendant had telephone conversations with his attorney and his wife. Pursuant to a policy established by the Newton Law Center, these telephone conversations were taped. On March 14, 1978, defendant filed and the Jasper County Attorney received a motion to produce, which included a request for the taped conversations. On March 16 the tapes were destroyed pursuant to Law Center policy calling for the destruction of such tapes after thirty days. Evidence indicates that the county attorney was unaware of this erasure policy.

Defendant claims that these tapes were exculpatory in that they could have demonstrated to the jury his coherence, alertness, pronunciation and capacity to conduct a serious conversation. He further maintains that the destruction of the tapes deprived him of a valuable instrument of defense which was not adequately compensated for through the testimony of witnesses at trial.

Before trial defendant moved for a dismissal and, in the alternative, asked that evidence of blood test results be suppressed as a sanction against the State for the destruction of the tapes. Both motions were denied. At trial defendant requested a jury instruction to the effect that evidence showed the State had destroyed the tapes and that where evidence is destroyed by the State, a presumption arises that the evidence would be, if produced, adverse to the State and favorable to defendant. The trial court refused to give this instruction. In a combined posttrial motion, defendant claimed that the trial court's refusal to give the instruction was error.

The State may not suppress evidence exculpatory to defendant. State v. King, 256 N.W.2d 1, 15 (Iowa 1977); State v. Van Rees, 246 N.W.2d 339, 345 (Iowa 1976); State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974). Defendant is entitled to such information to prepare for trial and to use it in the trial itself. Peterson, 219 N.W.2d at 674. The State may not refuse to produce exculpatory evidence because it believes the evidence is

false or that it would be inadmissible at trial. Id. The county attorney is charged with the responsibility of insuring that important evidence is not suppressed. Id. Where exculpatory evidence is suppressed, the defendant is entitled to appropriate relief, including possibly a new trial. King, 256 N.W.2d at 15; Van Rees, 246 N.W.2d at 345; Peterson, 219 N.W.2d at 674.

In this case defendant requested the tapes two days before their destruction. It was the responsibility of the county attorney to produce the tapes upon request by defendant. While it can be said that the county attorney's lack of compliance with the motion to produce was unintentional, the failure to produce exculpatory evidence may result in relief for defendant regardless of whether the failure was intentional or not. See State v. Galloway, 275 N.W.2d 736, 740 (Iowa 1979); King, 256 N.W.2d at 15-16.

But the State argues that the absence of this evidence at trial did not result in prejudice to defendant since witnesses were able to testify concerning the contents of the telephone conversations and defendant's manner of speech. It is true that the exclusion of evidence tending to prove a particular fact does not constitute reversible error where the claimed fact is fully established by other admitted evidence. State v. Hahn, 259 N.W.2d 753, 759 (Iowa 1977); State v. Hicks, 245 N.W.2d 319, 321 (Iowa 1976). Here, though, the nature of the crime charged, combined with the use of a sound recording device which could accurately reproduce defendant's voice and conversations and, consequently, show things that direct testimony could not, see Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972), requires a finding that the tapes were more than cumulative in nature and that defendant was prejudiced by their destruction.

Generally, where it is found that the State's failure to produce exculpatory evidence at trial resulted in prejudice to defendant, a new trial is ordered so that the suppressed evidence can be properly admitted. In this case, though, the evidence has been destroyed. Defendant, in an effort to cure the error, requested that the following instruction be given to the jury.

> There has been evidence adduced that the State destroyed two tape recordings of telephone conversations that the Defendant had after he was arrested and while he was in custody. The State destroyed these recordings two days after Defendant, by and through his attorney, requested their production.
>
> You are instructed that there is a presumption that evidence destroyed by the State would be, if produced,

> adverse to the State and favorable to the defendant. This presumption may be rebutted by other competent evidence, but if uncontradicted, the presumption is satisfactory proof of the matter in question.

Defendant maintains the above instruction represents a statement of the general rule that spoliation of evidence by the State creates an inference or presumption that it would not have supported the charge against the defendant. State v. Kietzke, 85 S.D. 502, 515, 186 N.W.2d 551, 558 (1971). The State claims that the above instruction is improper since the presumption arises only where the destruction was deliberate. United States v. David, 246 F.2d 895, 897 (7th Cir. 1957), cert. denied 355 U.S. 863, 78 S. Ct. 96, 2 L.Ed.2d 69 (1957); United States v. Coplon, 185 F.2d 629, 637 (2d Cir. 1950), cert. denied 342 U.S. 920, 72 S. Ct. 362, 96 L.Ed. 688 (1951); Berthold - Jennings Lumber Co. v. St. Louis, Iron Mountain & Southern Ry. Co., 80 F.2d 32, 42 (8th Cir. 1935); Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 81, 211 N.W.2d 810, 821 (1973). Here there is no evidence of deliberate destruction of the tapes for the purpose of preventing their production. Nevertheless the State is accountable for the result.

Instructions to the jury are used to cure error where defendant has been prejudiced by improperly admitted evidence. State v. Burrell, 255 N.W.2d 119, 122 (Iowa 1977); State v. Mattingly, 220 N.W.2d 865, 870 (Iowa 1974); State v. Ware, 205 N.W.2d 700, 704 (Iowa 1973). We hold defendant has been prejudiced by the State's failure to produce exculpatory evidence, which was destroyed after defendant filed a motion to produce, and is entitled to relief. We do not approve of defendant's requested instruction but find that an instruction should be given that spoliation of evidence creates an inference that the evidence would not have supported the charge against defendant.

Because we reverse and remand on this particular issue, we find it unnecessary to reach defendant's other issues.

REVERSED AND REMANDED.