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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DEREK JERMAINE HOTTERKNIGHT,<br><br>Defendant and Appellant. | F063221<br><br>(Super. Ct. No. F10903459)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Fresno County. Rosendo Peña, Judge.

John Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and John W. Powell, Deputy Attorneys General, for Plaintiff and Respondent.

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Derek Jermaine Hotterknight was convicted of crimes arising out of a hit-and-run accident. Hotterknight's sole contention on appeal is that the court erred in denying his

pretrial *Trombetta-Youngblood*[1] motion based on the police's failure to preserve the vehicle he was allegedly driving at the time of the accident. We affirm the judgment.

## FACTUAL BACKGROUND[2]

Around 1:00 a.m. on July 8, 2010, Deborah Harris was driving with her nephew on Shaw Avenue near Chestnut Avenue in Fresno, when her vehicle was struck by another vehicle. The next thing Harris could remember was waking up in the hospital three weeks later. Harris sustained multiple serious injuries and her nephew sustained comparatively minor injuries.

Police officers who responded to the accident scene observed Harris's wrecked vehicle on the sidewalk beneath a power pole. All the lights were out and the area was dark. The vehicle that struck Harris's vehicle was found about 100 yards away. The vehicle – a silver Chevrolet Tahoe with big chrome rims – was facing west in the eastbound lane. No one was in the Tahoe when the police arrived. The driver's side airbag was deployed and there was fresh blood on it.

Both physical evidence and witness accounts connected Hotterknight to the Tahoe and indicated he was driving the vehicle at the time of the collision.

Hotterknight's DNA profile matched the DNA profile of the blood on the airbag.

A police officer found Hotterknight's cell phone near the scene of the accident, and a private security guard located Hotterknight on the grounds of a nearby apartment complex.

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[1] *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*).

[2] Since Hotterknight does not challenge the sufficiency of the evidence supporting his convictions, a detailed recitation of trial testimony is unnecessary. Our factual background highlights some of the key evidence against Hotterknight to provide context to his contention on appeal.

Hotterknight's wife, whom the police officer contacted using Hotterknight's cell phone, informed the officer she was the owner of the Tahoe and that Hotterknight did not ask her permission to drive it. When Hotterknight was later taken to the hospital for a forced blood draw, an angry woman, whom police assumed to be his wife, showed up in the parking lot and started yelling at him. Hotterknight responded by saying something like, "I have a Tahoe, I have a Lexus. I don't know what the problem is if I wrecked one of the cars, that's what I have insurance for."

Shortly before the accident occurred, three security guards escorted a visibly intoxicated Hotterknight out of Fajita Fiesta, a restaurant/night club on Shaw Avenue, after Hotterknight reportedly grabbed the buttocks of a female bartender. The security guards testified to how Hotterknight flashed money at them to try to get back inside the club and became belligerent when they offered to get him a taxi.

Hotterknight got into a large SUV and flipped off the security guards as he drove out of the parking lot. As Hotterknight drove out of the parking lot, one of the security guards saw Hotterknight almost hit another vehicle that was traveling east on Shaw Avenue. Within five to ten minutes of Hotterknight leaving, all the lights went off on the block, including those of Fajita Fiesta and the surrounding restaurants.

Two women testified they were driving in a car eastbound on Shaw Avenue, when a large SUV pulled out of the Fajita Fiesta parking lot and almost hit their car. The SUV was a Tahoe or Escalade with large chrome or silver rims. After it almost hit them, the SUV continued to drive erratically ahead of them.

Shortly after they lost sight of the SUV, the women saw a big flash or spark. Then all the power and lights went off on Shaw Avenue. They soon arrived at an accident scene and saw a vehicle lying underneath a power pole. Further up the road, they saw the SUV that almost hit them, facing the wrong direction. Two males appeared to be running away from the passenger side of the SUV.

Testing of blood drawn from Hotterknight at 4:15 a.m. on the morning of the accident revealed a blood alcohol level of .18 percent. At the time of the accident, his blood alcohol level would have been between .22 and .25 percent. In addition, Hotterknight tested positive for methylenedioxymethamphetamine, also known as MDMA or ecstasy.

## PROCEDURAL BACKGROUND

On February 9, 2011, the district attorney filed a first amended information charging Hotterknight with driving while having a blood alcohol content of .08 percent or more and causing bodily injury (Veh. Code, § 23153, subd. (b); count 1), driving under the influence and causing injury (Veh. Code, § 23153, subd. (a); count 2), leaving the scene of an accident (Veh. Code, § 20001, subd. (a); count 3), and misdemeanor battery (Pen. Code, § 242; count 4). In counts 1 and 2, the information alleged that Hotterknight personally inflicted great bodily injury upon Deborah Kay Harris (Pen. Code, § 12022.7, subd. (a)), and caused bodily injury to more than one victim (Veh. Code, § 23558). In count 1, the information further alleged that Hotterknight had a blood alcohol content of .15 percent or higher (Veh. Code, § 23578). Additionally, the information alleged that Hotterknight had been convicted of a serious or violent felony within the scope of the three strikes law (Pen. Code, §§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d)) and that he had served a prior prison term (Pen. Code, § 667.5, subd. (b)).

On February 17, 2011, a jury found Hotterknight guilty of count 4. The jury was unable to reach a verdict and the court declared a mistrial as to the remaining counts. The court subsequently set a tentative date for a retrial.

On May 23, 2011, Hotterknight filed his *Trombetta-Youngblood* motion. The court denied the motion following an evidentiary hearing on May 24, 2011.

On June 8, 2011, a jury found Hotterknight guilty as charged in counts 1, 2, and 3. Hotterknight waived his right to a court trial and admitted the strike prior and prison prior. On August 30, 2011, the court sentenced him to a total prison term of 12 years.

## DISCUSSION

Hotterknight argues the court committed reversible error by denying his pretrial *Trombetta-Youngblood* motion based on the police's failure to preserve the Tahoe following the accident. We disagree.

### *1. Background*

On May 23, 2011, Hotterknight filed a *Trombetta-Youngblood* motion to dismiss the case or, alternatively, to "exclude any evidence gained from law enforcement testing of the Chevy Tahoe." The motion argued:

> "The exculpatory value of the Chevy Tahoe was apparent when it was taken into custody of law enforcement. The bulk of the government's case is based on the random blood sample taken from the airbag in the Tahoe. Many other tests could have been done to determine who was the driver of the Tahoe during the night in question."

The motion asserted that the defense's mechanical engineer, who later testified at trial, could have conducted particular tests to determine, among other things, whether the blood stain found on the driver's side airbag was placed there by "voluntary occupant motion … or from an involuntary motion as a result of the collision itself" and whether the passenger's side airbag was malfunctioning at the time of the collision. The motion asserted such testing was "especially critical" because the defense theory was that Hotterknight was seated in the front passenger's seat, but the passenger side airbag failed to deploy due to a malfunction.

At the evidentiary hearing on May 24, 2011, John DeCicco, the owner of Action Towing, testified he took custody of the Tahoe on July 8, 2010, pursuant to a contract with the Fresno Police Department to collect evidence in traffic collisions. DeCicco observed that whoever filled out the electronic inventory report, which the police department faxed to him, mistakenly marked the "impound" box instead of the hit-and-run box. However, DeCicco testified he did not treat evidence any differently based on

which box was marked but would go by what the officer told him. Also, it appeared one of DeCicco's secretaries handwrote "hit and run" on the report.

DeCicco further testified that to release a vehicle in his custody, he needed a vehicle release form from the police department. In this case, the vehicle release form directed him to release the Tahoe to Stacy Hotterknight as the registered owner. The form thus authorized DeCicco to release the vehicle either to the registered owner or her agent. He recalled releasing the Tahoe to an insurance company.

DeCicco had the Tahoe in his custody for six days, from July 8 to July 13, 2010. He testified that the length of time he keeps vehicles for the police "varies." "Some of them are a year, some of them are ten years, some are a month, depending on the case."

Fresno Police Officer Eric Kong testified he was dispatched to the traffic collision on July 8, 2010, and was the primary officer for the call. Kong directed Officer Cheryl Montoya to collect DNA swabs from the Tahoe. Kong acknowledged that it was a near fatal car accident and he thought the evidence in such a case would be extremely important, which was why he had Montoya take DNA swabs from the vehicle.

Kong further testified he generated the vehicle inventory report by entering information in a computer at the scene of the collision, and instructed the tow company to impound the Tahoe as evidence. Kong handled the vehicle in accordance with the normal practices of the police department.

Fresno Police Detective Michael Rossi, who was assigned to investigate hit-and-run cases at the time, testified he collected a DNA sample from Hotterknight several months after the collision.

Rossi also confirmed that he was the officer who authorized the release of the Tahoe from impound six days after the collision. Rossi recalled that either the insurance company or the registered owner, Stacy Hotterknight, contacted him and requested the release of vehicle.

Rossi testified that in cases he investigated, he typically did not keep impounded vehicles as evidence for very long. He did not perform mechanical inspections of vehicles involved in nonfatal traffic accidents such as this one. In fatal traffic accidents, the Collision Reconstruction Unit (formally known as the MAIT team) takes possession of the vehicles and they remain impounded for a much longer period of time because the Unit conducts a more thorough investigation. Had the vehicle in this case been treated as a Collision Reconstruction Unit tow, Rossi would not have had the authority to release it.

Rossi handled the Tahoe in accordance with the normal practices of the police department. In accordance with those practices, he made a decision to release the vehicle after reviewing the case and determining "it didn't appear there was anything that I was going to be able to investigate further by having the vehicle in impound."

The court denied the *Trombetta* motion, reasoning:

> "[A]ll that has been shown here is that it's possible that the vehicle might contain exculpatory evidence if further examined. There's been no showing that it[]s exculpatory nature was apparent before it was released. And in this case there's been no showing of bad faith. There was no showing that the detective authorizing the release had animus towards Mr. Hotterknight or towards this case. He testified that he evaluated this case as he does all the other cases that he has handled, and that he released it pursuant to his determination that further investigation was not necessary, as he has done in many other cases.
>
> "Court finds no evidence that this was done in bad faith. In fact, the vehicle was released to the defendant's wife and/or her insurance company and was not otherwise destroyed. Or there was nothing from which the Court could infer that this was being destroyed or released for the purpose of hiding exculpatory evidence."

***2. Applicable Legal Principles***

Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*Trombetta*, *supra*, 467 U.S. 479, 488.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that

was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at p. 489.)

The state's responsibility is further limited when the defendant's challenge is based on the failure to preserve *potentially* exculpatory evidence—that is, "evidentiary material of which no more can be said than that *it could have been subjected to tests*, the result of which *might* have exonerated the defendant." (*Youngblood*, *supra*, 488 U.S. 51, 57, italics added.) "[U]nless 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." (*Id.* at p. 58.)

"The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Youngblood*, *supra*, 488 U.S. at pp. 56-57, fn. *.) It is significant whether the state knew the evidence could form a basis for exonerating the defendant and failed to preserve it as part of a conscious effort to circumvent its constitutional discovery obligation. (*Trombetta*, *supra*, 467 U.S. at p. 488.) The negligent destruction of, or failure to preserve, potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Youngblood*, *supra*, 488 U.S. at p. 58.)

"On review, we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling." (*People v. Roybal* (1998) 19 Cal.4th 481, 510.)

### *3. Analysis*

We agree with the trial court that Hotterknight failed to show the Tahoe possessed apparent exculpatory value when Detective Rossi authorized its release from impound.[3] Hotterknight argues that "[t]he only evidence in existence to show that [he] was not behind the wheel was contained in the Chevy Tahoe." However, we simply do not know whether additional evidence derived from the Tahoe necessarily would have been exculpatory. It is speculative to assume as much. We can just as easily speculate that additional testing of the Tahoe would have provided further proof that Hotterknight was the driver.

Thus, the *Youngblood* bad faith test applies because the unpreserved Tahoe was merely "potentially useful evidence." (*Youngblood*, *supra*, 488 U.S. at p. 58.) In *Trombetta*, the high court found no constitutional violation where "the record contain[ed] no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence." (*Trombetta*, *supra*, 467 U.S. 479, 488.) Similarly, here, there was no evidence that, in authorizing the release of the Tahoe, Rossi intended to deprive Hotterknight of exculpatory evidence or to otherwise harm him. Instead, Rossi's testimony established he followed standard police procedure in handling the vehicle. Hotterknight's suggestion that bad faith may be imputed to Rossi because the standard procedure he followed in this case was "deliberately biased against defense interests" is without either evidentiary or legal support. Hotterknight has failed to establish the court erred in denying his *Trombetta-Youngblood* motion.

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[3] For purposes of our analysis, we assume the police were responsible for the Tahoe's unavailability as evidence and do not address the Attorney General's claim that *Trombetta* sanctions would have been inappropriate in this case because private parties were ultimately responsible for the evidence's destruction.

## DISPOSITION

The judgment is affirmed.

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Gomes, J.

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Detjen, J.