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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2016AP88-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KARL W. NICHOLS,

Defendant-Respondent.

APPEAL FROM AN ORDER ENTERED IN THE
CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE ELLEN K. BERZ, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Was the defendant's right to due process violated by the State's failure to preserve evidence that was apparently exculpatory, or by the failure in bad faith to preserve evidence that was potentially exculpatory?

The circuit court ruled that the State acted in bad faith when it failed to preserve apparently exculpatory evidence.

ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this case involves only the application of settled law to the facts of this case.

STATEMENT OF THE CASE

Nature Of The Case

This is an appeal by the State from an order of the Circuit Court for Dane County, Ellen K. Berz, Judge, entered December 1, 2015, which vacated the conviction of the defendant-respondent, Karl W. Nichols, for first-degree sexual assault of a child, and dismissed the case with prejudice, because the court found that the State, acting in bad faith, failed to preserve evidence that was apparently exculpatory.

Procedural History

On September 26, 2011, the victim, MW, was interviewed by Jane Holzrichter, the director of the Child Advocacy Center at Horizons Mental Health Center in Hutchinson, Kansas, regarding events that had transpired several years earlier in Madison, Wisconsin. (85, Ex. 2; 141:91.) A second interview was conducted December 22, 2011. (85, Ex. 3.)

Based on the information provided by MW in these interviews, the case was referred to the Madison Police Department for possible charges of child sexual assault. (2:1.)

The Dane County District Attorney filed a complaint charging Nichols with first-degree sexual assault of a child on March 6, 2012. (2.)

Following a jury trial conducted November 12 to 14, 2013, Nichols was convicted of the charged offense, and sentenced to five years of probation. (97; 134-40.)

Nichols filed a postconviction motion May 29, 2015, complaining, among other things, that the State failed to preserve and disclose exculpatory evidence. (98.)

An evidentiary hearing was held August 5 and 6, and September 14, 2015. (141-43.)

The circuit court issued its decision and order granting the postconviction motion in part, vacating Nichols' conviction and dismissing the case with prejudice on December 1, 2015. (121.)

The State appealed January 7, 2016. (123.)

Disposition In The Circuit Court

In a lengthy and detailed decision and order, the circuit court found that at the second interview, MW had a list of corrections she wanted to make regarding things she said at the first interview. (121:19.)

The court found that Holzrichter failed to preserve this list, and that the list was never given to Detective Justine Harris, the investigating officer on the case in Madison. (121:19-20.) The court found that the list was never preserved by the State and no longer exists. (121:21.)

The court found that MW's list of corrections was apparently material and exculpatory because the prosecution's case depended solely on the statements of the victim. (121:21.) The court assumed that the unknown corrections could have been devastating to MW's credibility, and could have enabled the defense to strongly discredit MW's memory, honesty and motives. (121:22-23.)

The court thought that the unpreserved evidence was material because it could have played such a significant role in the defense strategy that the failure to preserve the evidence shook the court's confidence in the fairness of the trial and the verdict. (121:23.)

The court found that the exculpatory value of the list of corrections was apparent at the time of the second interview. (121:23-24.)

The court speculated that the defense could not obtain comparable evidence by asking MW to recreate her list of corrections. (121:24-25.)

The court found that the State acted in bad faith because no one in Wisconsin asked Holzrichter to give them MW's list of corrections. (121:25-26.) The court found that Holzrichter acted in bad faith by obviously attempting to conceal the list. (121:26.) The court found that the State made conscious efforts to suppress exculpatory evidence. (121:27.)

The court determined that the proper remedy to avoid a corruption of the truth-seeking function of the trial process was vacation of the judgment of conviction and dismissal of the case with prejudice. (121:27-28.)

Facts

MW was born March 25, 2001, and lived in Madison until 2010 when she and her family moved to Kansas. (2:1.)

In September 2011, MW told her parents that Nichols had touched her vagina when they were living in Madison. (2:2.)

On September 26, 2011, when MW was ten years old, she had her first interview with Holzrichter. (85, Ex. 2:4.)

MW told Holzrichter that she would have sleepovers at Nichols' house where she and Nichols' son, who was her age, would wrestle with Nichols while they were wearing little or no clothing. (85, Ex. 2:13-14.) MW said this happened often when she was between four and seven years old. (85, Ex. 2:15.)

MW said she took off her clothes because she was hot. (85, Ex. 2:14.) She said that Nichols did not object to her getting undressed, and encouraged her to take her clothes off. (85, Ex. 2:14-15.)

MW recounted one incident when she was four or five when Nichols felt around the inside and outside of her vagina with his hands. (85, Ex. 2:19.) Nichols told her that he wondered what it was like to have a vagina because he did not have one. (85, Ex. 2:20.) MW did not have any objection because, being so young, she did not think there was anything wrong with it. (85, Ex. 2:19, 22.)

Although MW said that was the only time that Nichols intentionally touched her vagina, there was one other occasion when Nichols incidentally touched her unclothed vagina as he was giving her a sponge bath. (85, Ex. 2:20, 34-35.)

MW admitted that it was hard for her to remember everything clearly after so long, and that many of her memories blended together. (85, Ex. 2:21, 28.) However, she said that nothing else happened that she could think of. (85, Ex. 2:37-38.)

When the Madison police became involved in the case, they asked Holzrichter to conduct a second follow up interview to clarify information MW provided at the first interview, and to get additional information on topics that had not been fully covered the first time. (111; 141:99; 143:62, 88.) Detective Harris listened to this interview on the telephone. (143:61-62.)

At the second interview, MW acknowledged that she had watched a recording of her first interview. (85, Ex. 3:11.) At this time MW was holding a pad of paper, which she continued to hold throughout the second interview. (85, Ex. 5; 121:16.)

MW went into more detail about what happened during the touching incident. She said that she climbed up onto Nichols' lap when he patted it while he was sitting in a reclining chair. (85, Ex. 3:13-14.) Nichols asked MW if he could touch her vagina because he wondered what it would be like to be a girl and have a vagina. (85, Ex. 3:14-15.) When MW said yes, Nichols asked her to unzip her pajamas, which she did. (85, Ex. 3:15.) MW did not remember what happened to the underwear she had on, but stated that Nichols touched her vagina inside and out with his hands. (85, Ex. 3:14, 16, 35.)

Again, MW admitted that her memory was not the best, but assured Holzrichter that everything she said that day was true to the best of her recollection. (85, Ex. 3:31, 41.)

After the questioning was concluded, Holzrichter asked MW if she had written down some things she was wondering about. (85, Ex. 3:44, 46.)

MW replied, "I wrote down some things that I think I, I changed from the last interview." (85, Ex. 3:46; 121:17.)

MW said that Nichols did not suggest that she should take off her clothes as she previously stated. (85, Ex. 3:46.) She said that Nichols simply did not object when she took her clothes off. (85, Ex. 3:46.)

Holzrichter asked MW if she felt that it was her fault that she did not object to any of this. (85, Ex. 3:46.)

MW said that she did feel it was her fault, but felt better after she talked to her therapist about it. (85, Ex. 3:46.)

Holzrichter then stood up, walked toward the door, and suggested that MW should say goodbye to the people who were listening to the interview. (85, Ex. 3:46; 85, Ex. 5; 121:17.)

But MW, following Holzrichter with the pad of paper in her hand, said, "First, can I tell you, um, the rest of this?" (85, Ex. 3:46; 85, Ex. 5; 121:17.)

Holzrichter said, "Sure. We can do that and then I'm going to take a copy of it so they can have it, too." (85, Ex. 3:46.)

At that point the recording of the interview ended. (85, Ex. 3:46.)

The recordings of both interviews were played at the trial, and the transcripts were provided to the jurors. (135:31, 48.)

At the hearing on Nichols' postconviction motion, Holzrichter said that MW handed her the list of changes she had written down. (141:92.) She admitted that she did not make a copy of the list. (141:93.) She thought she had read the list, but

was not sure. (141:103.) She also thought she had given the list to a worker from the Department of Children and Families, but had no present memory of actually doing that. (141:92, 104.) She admitted that she did not send a copy of the list to Detective Harris in Madison. (141:93, 105-06.)

Detective Harris testified that having listened to the second interview on the phone, she was aware that MW had a list of changes. (143:62.) Harris said she never received a copy of that list. (143:63.) She explained that she did not follow up on the list with anyone in Kansas because she did not think it was significant. (143:63-64, 99.)

But when Nichols' postconviction counsel thought the list was significant, Harris attempted to retrieve it from several people in Kansas without success. (143:65-67.)

ARGUMENT

The defendant's right to due process was not violated by the State's failure to preserve evidence.

This case actually comes in the context of a claim of ineffective assistance of counsel for failing to raise in the circuit court any issue involving the State's failure to preserve MW's list of changes to things she said at the first interview.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). A claim of ineffective assistance fails if the defendant fails to prove either one of these

requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

Nichols would not be able to prove prejudice if the State was not constitutionally culpable for failing to preserve the list of changes. So the easiest way to proceed on this appeal is to show that Nichols' right to due process was not violated by the State's failure to preserve this list.

The Due Process Clause does not impose 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." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). *Accord State v. Weissinger*, 2014 WI App 73, ¶ 10, 355 Wis. 2d 546, 851 N.W.2d 780, *aff'd sub nom. State v. Luedtke*, 2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488 (1984). *Accord State v. Hahn*, 132 Wis. 2d 351, 358, 392 N.W.2d 464 (Ct. App. 1986).

Thus, the Constitution distinguishes between material exculpatory evidence and evidence that is only potentially useful to the defense. *Illinois v. Fisher*, 540 U.S. 544, 547-49 (2004); *Weissinger*, 355 Wis. 2d 546, ¶ 10.

Due process is violated when the State fails to preserve material exculpatory evidence regardless of the good or bad faith of the prosecution. *Fisher*, 540 U.S. at 547 (citing *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976)); *Weissinger*, 355 Wis. 2d 546, ¶ 10; *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994).

By contrast, failure to preserve potentially useful evidence does not violate due process unless the State acted in bad faith. *Fisher*, 540 U.S. at 547-48 (citing *Youngblood*, 488 U.S. at 57-58); *Weissinger*, 355 Wis. 2d 546, ¶ 10; *Greenwold*, 189 Wis. 2d at 67.

To be exculpatory, evidence must have both qualitative and quantitative attributes.

Qualitatively, evidence must be favorable to the accused, either because it tends to establish his innocence or because it impeaches the credibility of a prosecution witness. *State v. Harris*, 2004 WI 64, ¶ 12 & nn.9-10, 272 Wis. 2d 80, 680 N.W.2d 737 (citing *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999), and *United States v. Bagley*, 473 U.S. 667, 676 (1985)). *See Youngblood*, 488 U.S. at 58.

Quantitatively, the evidence must be material because it puts the whole case in such a different light that it undermines confidence in a verdict of guilt. *Harris*, 272 Wis. 2d 80, ¶¶ 13-15 & nn.12-13 (citing *Bagley*, 473 U.S. at 682, and *Giglio v. United States*, 405 U.S. 150, 154 (1972)). The mere possibility that information might help the defense does not make it material in the constitutional sense. *Harris*, 272 Wis. 2d 80, ¶ 16 (citing *Agurs*, 427 U.S. at 109-10). There is never a violation of the duty to disclose evidence unless the failure to disclose was so serious that there is a reasonable probability that the undisclosed evidence would have resulted in a different verdict. *Harris*, 272 Wis. 2d 80, ¶ 14 (citing *Strickler*, 527 U.S. at 281).

Evidence is apparently exculpatory when it possesses an exculpatory value that was apparent before the evidence was lost, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Trombetta*, 467 U.S. at 489; *State v. Munford*, 2010 WI App

168, ¶ 21, 330 Wis. 2d 575, 794 N.W.2d 264; *Greenwold*, 189 Wis. 2d at 67.

Evidence is potentially exculpatory when it could have led to other evidence that could have exonerated the defendant. *Fisher*, 540 U.S. at 547-48; *Harris*, 272 Wis. 2d 80, ¶ 12. *See Youngblood*, 488 U.S. at 56-57 & n.*.

The police act in bad faith when they are aware of the potentially exculpatory value of the evidence, and act with official animus or make a conscious effort to suppress it. *Weissinger*, 355 Wis. 2d 546, ¶ 10; *Greenwold*, 189 Wis. 2d at 69. There is no bad faith when the police negligently, inadvertently or carelessly fail to preserve the evidence. *Greenwold*, 189 Wis. 2d at 68-70. *See Youngblood*, 488 U.S. at 58.

A defendant who claims his right to due process was denied by the loss of apparently exculpatory evidence must demonstrate both that the evidence had an exculpatory value that was apparent to those who had custody of the evidence before it was lost, and that he was unable to obtain comparable evidence by other reasonably available means. *Munford*, 330 Wis. 2d 575, ¶ 21. *See Greenwold*, 189 Wis. 2d at 69.

When the evidence is only potentially exculpatory, the defendant has the burden to prove the police acted in bad faith. *Greenwold*, 189 Wis. 2d at 70.

If the defendant succeeds in establishing a due process violation, the imposition of a sanction for the violation is within the discretion of the circuit court. *State v. Huggett*, 2010 WI App 69, ¶ 25, 324 Wis. 2d 786, 783 N.W.2d 675; *Hahn*, 132 Wis. 2d at 361.

On appeal, the circuit court's findings of fact will be upheld unless they are clearly erroneous. *Hahn*, 132 Wis. 2d at

356-57. The question whether there was a constitutional violation because of the failure to preserve evidence is considered de novo. *Greenwold*, 189 Wis. 2d at 66-67; *Hahn*, 132 Wis. 2d at 357. The circuit court's choice of a sanction is reviewed for erroneous exercise of discretion. *Hahn*, 132 Wis. 2d at 361.

A. The unpreserved evidence was not apparently exculpatory.

1. The unpreserved evidence would not impeach the credibility of a prosecution witness.

MW's list of changes to some things she said at the first interview was not apparently exculpatory because it would not impeach her credibility. To the contrary, it elevated her credibility.

The fact that a ten-year-old girl, on her own, without anyone suggesting that anything she said at the first interview needed to be changed, took the initiative in drawing up a list of changes she thought should be made shows that MW was trying to be scrupulously honest and accurate about everything she said.

MW brought her list of changes to the attention of the person who interviewed her without being asked if there was anything that should be changed. (85, Ex. 3:46.) She persisted in seeking to make those changes when the interviewer did not think her changes mattered. (85, Ex. 3:46.)

The circuit court overstated the case when it said that confidence in MW's ability to accurately remember an event

that happened when she was four years old could have been "severely eroded" by her list of changes. (121:23.)

The fact that MW wanted to make some changes in things she said at the first interview indicates that her memory may have initially been faulty. But MW admitted at both interviews that she had difficulty remembering everything clearly. (85, Ex. 2:21; 85, Ex. 3:17.) So the list of changes did not imply anything that was not stated expressly. The list did nothing to additionally erode MW's credibility.

Indeed, the fact that MW wanted to make changes at the second interview shows that her memory had improved over what it had been the first time. And because she now remembered things better, she wanted to get straight some things she may not have remembered as clearly at the first interview.

In any event, any lapses of memory concerned completely collateral matters. MW's memory of the event that resulted in the criminal charges against Nichols was clear and detailed in both interviews. (85, Ex. 2:19-20; 85, Ex. 3:13-16.) MW said that she remembered the things that she said happened to her. (85, Ex. 3:43-44.) MW's memory about other things may have been fuzzy, but not about that.

Thus, the unpreserved evidence would not have adversely affected the credibility of MW regarding her testimony that Nichols touched her vagina.

2. The unpreserved evidence was not material.

a. It is not probable that the unpreserved evidence would have changed the result of the trial.

MW never said that she had any "corrections" to make in anything she said. She said she had "changed" some things from the first interview. (85, Ex. 3:46; 121:17.)

The word "change" simply means to cause to be different, or to exchange or replace. *The American Heritage Dictionary of the English Language* 319 (3d ed. 1996); *Webster's Third New Int'l Dictionary* 373-74 (unabr. 1986). It does not have the connotation of substituting something for what is mistaken, inaccurate or untrue that the word "correction" has. *American Heritage Dictionary* at 422; *Webster's Dictionary* at 511. That word, with its negative connotation, was used by persons other than MW to inaccurately restate what MW said.

The circuit court's finding that MW had a list of "corrections" from her "incorrect" statements at the first interview (121:19) is clearly erroneous. The fact reflected by the record is that MW had a list of "changes," with no connotation that anything she wanted to change was necessarily incorrect or untrue.

The first change that MW wanted to make at the end of the second interview was helpful to Nichols. MW indicated that Nichols did not encourage her to take off her clothes, as she said the first time, but that he merely did not object when she took them off. (85, Ex. 3:46.)

The circuit court "assume[d]" from MW's "intelligence" that the other changes she had written down were of "similar significance." (121:22.)

But the court's conclusion does not follow logically from its premise. The fact that MW is intelligent has no bearing on the nature of the changes she wanted to make. An intelligent child could make changes that were insignificant or inculpatory as well as changes that were significant or exculpatory. What might have seemed significant to a child striving to scrupulously state the facts might not be significant to a court striving to correctly apply the law.

In fact, the record reveals absolutely no reason to believe that any of the other changes MW wanted to make would have been similarly helpful to Nichols.

At the second interview, MW said no more than that there were "some things" that she had "changed" from the first interview. (85, Ex. 3:46; 121:17.) Beyond the one change that was discussed, MW said nothing to suggest what other things she had changed or how she had changed them.

As far as the record shows, MW has never been asked since that interview about the other changes on her list. And the only other person who may have seen the list did not remember any of the other changes. (141:109-10.)

Just because one change was exculpatory does not necessarily mean that other changes would not have been irrelevant or even inculpatory.

Indeed, the most significant change MW made at the second interview was inculpatory, recalling with more detail what happened the time Nichols touched her vagina. (85, Ex. 3:13-16.)

Noting that Holzrichter ended the recorded interview by telling MW that they could discuss her other changes afterwards, the circuit court said that "[d]iscussing corrections (sic) to M.R.W.'s statement outside of the videotaped interview makes no sense . . . ." (121:23.)

No sense, that is, unless the other changes on the list were not sufficiently significant to discuss on the record, in which case Holzrichter's actions would make perfect sense.

The circuit court stated that the "significance of [the unpreserved] evidence cannot be overstated," but then proceeded to do just that, saying that its confidence in the verdict and the very fairness of the trial had been shaken. (121:23.)

But without knowing what specific changes MW wanted to make, it is utterly impossible to conclude that any of those changes would have been material because it is utterly impossible to calculate how they could have probably changed the result of the trial. *See Harris*, 272 Wis. 2d 80, ¶¶ 13-15 & nn.12-13 (and cases cited).

Even changes that might have been helpful to Nichols in some way would not necessarily have been so helpful as to raise any question about his guilt.

The change that is known, the first and perhaps most important change on MW's list, while helpful to Nichols, obviously was not sufficient to keep the jury from finding him guilty. That Nichols may not have ordinarily encouraged MW to take off her clothes did not change the fact that he did nothing to discourage her from being naked when interacting with him. (85, Ex. 2:14-15, 28.) It did not change the fact that he told her to unzip her pajamas the time he touched her vagina. (85, Ex. 3:15.)

Since there is absolutely no reason to believe that any of the other changes MW wanted to make would have been any more likely to change the result of the trial than the one she did make, there is no reason to believe that the unpreserved list of these changes was in any way material.

The circuit court's finding that "[c]learly, M.R.W.'s written corrections (sic) were immediately recognized as exculpatory" (121:24) is clearly erroneous.

MW's written changes have never been shown to be exculpatory, and no one connected with the prosecution of this case has ever recognized those changes as being exculpatory.

b. The unpreserved evidence was not of such a nature that the defendant was unable to obtain comparable evidence by other reasonably available means.

When MW first viewed the recording of her first interview, she knew immediately that there were some things she wanted to change. (85, Ex. 3:46; 121:17.)

MW is intelligent. (121:22-23.) And at the trial, after the recordings of both her interviews had been played, she stated that her memory at that time was "about the same" as it was at the time of the first interview, and not "that much better or worse" than it was at the time of the second interview. (135:31, 48; 136:42.)

Therefore, there is good reason to believe that at the time of the trial, and even now, MW could have remembered the things she wanted to change in her first interview, and could

have recreated the list of changes she had at the second interview.

Since Nichols has never asked MW if she could remember and recreate her list of changes, he has not met his burden to prove that he is unable to obtain evidence comparable to the unpreserved evidence by means other than getting the original physical list.

Indeed, the recording of the second interview shows MW leaving the interview room with her list still in her hand. (85, Ex. 5.) Thus, it may be possible that MW never gave the list to anyone else, and might still have the original in her possession.

The circuit court was wrong on both the facts and the law when it said that Nichols "cannot rely on M.R.W. to remember her corrections (sic) from 2011, four years ago, especially when taking the position that her memory is unreliable." (121:25.)

The facts discussed above show there is a good chance that MW can remember her changes.

And the law requires Nichols to at least make an effort to see if MW can remember her changes. *Munford*, 330 Wis. 2d 575, ¶ 21. *See Greenwold*, 189 Wis. 2d at 67.

The suggestion that a defendant is absolved of his legal responsibility to try to determine the facts just because the facts might not support the position he wants to take finds no support in the law. A defendant cannot make an erroneous claim that evidence has been lost when in fact a reasonable inquiry would show that it has just been misplaced.

So for this second reason, Nichols has failed to show that the unpreserved evidence was material. *Trombetta*, 467 U.S. at

489; *Munford*, 330 Wis. 2d 575, ¶ 21; *Greenwold*, 189 Wis. 2d at 67.

Because the unpreserved list of changes MW wanted to make to some things she said at her first interview would not have impeached her credibility, would not necessarily have been helpful to the defense, would not probably have changed the result of the trial, and probably could have been recreated, it was not apparently exculpatory evidence.

B. The unpreserved evidence was not lost as a result of anyone acting in bad faith.

Because the list of changes MW wanted to make to some things she said at her first interview was not apparently exculpatory, Nichols' right to due process would not have been denied unless the State acted in bad faith in failing to preserve the evidence. *Fisher*, 540 U.S. at 547-48 (citing *Youngblood*, 488 U.S. at 57-58); *Weissinger*, 355 Wis. 2d 546, ¶ 10; *Greenwold*, 189 Wis. 2d at 67.

The agents of the State would have had to be aware of the potentially exculpatory value of the evidence, and would have had to act with official animus or make a conscious effort to suppress it. *Weissinger*, 355 Wis. 2d 546, ¶ 10; *Greenwold*, 189 Wis. 2d at 69.

If the State's agents negligently, inadvertently or carelessly failed to preserve the evidence there would not be any bad faith. *Greenwold*, 189 Wis. 2d at 68-70. *See Youngblood*, 488 U.S. at 58.

Whether the State or any of its agents acted in bad faith is a mixed question of fact and law. *Bosco v. LIRC*, 2004 WI 77,

¶ 18, 272 Wis. 2d 586, 681 N.W.2d 157; *Brown v. LIRC*, 2003 WI 142, ¶ 10, 267 Wis. 2d 31, 671 N.W.2d 279.

The conduct of the actor is a question of fact. *Bosco*, 272 Wis. 2d 586 ¶ 18; *Brown*, 267 Wis. 2d 31, ¶ 10. The defendant has the burden to prove the facts said to show bad faith. *Greenwold*, 189 Wis. 2d at 70.

But whether the person acted in bad faith is a question of law. *Bosco*, 272 Wis. 2d 586 ¶ 19; *Brown*, 267 Wis. 2d 31, ¶ 11. Therefore, an appellate court is not bound by a circuit court's conclusion that someone acted in bad faith. *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 518, 385 N.W.2d 171 (1986).

1. Jane Holzrichter did not act in bad faith.

The circuit court said,

> Interviewer Holzrichter was calm and patient until M.R.W. explained the first correction (sic). Then, Interviewer Holzrichter hurried to change the subject, leave the room and stop the taping. She did not even pause to allow M.R.W. to discuss her other corrections (sic). Instead, Interviewer Holzrichter pacified M.R.W. by saying they would discuss her list outside the interview room.

(121:23.)

The circuit court subsequently stated, "Interviewer Holzrichter's obvious attempts to conceal M.R.W.'s written corrections (sic) constitute bad faith." (121:26.)

The court's narrative of what happened at the end of the second interview and its conclusion that Holzrichter obviously attempted to conceal MW's list of changes are both clearly

erroneous. The court's error can be traced to its failure to consider three critical facts concerning the interview.

First, this was the second interview MW had with Holzrichter.

The first interview was conducted because MW was feeling sick from stress or worrying about something her mother said she could not discuss with her teachers. (85, Ex. 2:4-6.) It was not apparent until well into the interview that the events MW was talking to Holzrichter about did not occur in Hutchinson, Kansas, where the interview was conducted, but in Madison, Wisconsin. (85, Ex. 2:16.)

The second interview, three months later, was at the request of the police in Madison. (141:99.) The purpose of the second interview was to clarify information MW had provided in the first interview and to get additional information on topics that had not been fully covered. (111.)

So at the second interview, Holzrichter was just doing a favor for authorities in another jurisdiction that had no relation to any crime or other activities that occurred in her jurisdiction. And she was simply conducting a follow up to fill in some of the blanks in her first interview.

The second critical fact is that Holzrichter did not consider the first change MW wanted to make, i.e., that she took her clothes off without any suggestion from Nichols, to be an assertion that Nichols was not guilty of doing the things MW said he did.

Rather, Holzrichter viewed MW's stated change as an expression of her own feeling of guilt for not objecting to any of the things Nichols did. (85, Ex. 3:46.)

MW admitted that she had felt it was her fault for not objecting. (85, Ex. 3:46.)

The third critical fact is the time code on the video recording of the second interview.

The time code shows that almost exactly one hour after the interview began, Holzrichter ended her questioning by saying, "I think that's all that we have." (85, Ex. 3:44; 85, Ex. 5.)

After a couple more minutes spent winding things up, Holzrichter inquired about the things MW had written down. (85, Ex. 3:46.) When MW said she felt better after talking to a therapist about her feeling of guilt, Holzrichter told MW that she should say goodbye to Detective Harris, if Harris was still on the phone, and that she and MW should go out and get something to drink (85, Ex. 3:46). The video shows that Holzrichter was leaving the interview room when she said this. (85, Ex. 5.)

The video shows that Holzrichter was already out of the room, and that MW was leaving too when she asked if she could tell Holzrichter about the rest of her changes. (85, Ex. 3:46; 85, Ex. 5; 121:17.) MW was holding the written list as she left the room. (85, Ex. 5.)

The most reasonable inferences that can be drawn from these undisputable facts are that Holzrichter had set aside one hour to do a second interview with MW at the request of the authorities in another jurisdiction.

When that hour was up, Holzrichter considered her favor to be done. It was time for her to move on to other matters that were more relevant to her responsibilities in Kansas.

Holzrichter did not consider MW's changes to be sufficiently significant to warrant any extension of the second gratuitous interview beyond the time she had allotted.

Since none of the people involved with child protection in Kansas were able to find the list after that (141:103-06; 143:63, 65-67), the most reasonable inference is that MW may have orally told Holzrichter about the rest of her changes as she asked to do, but never gave Holzrichter the written list. The circuit court expressly found that MW's list of changes "was never preserved by the State." (121:19, 21.)

Perhaps Holzrichter could be faulted for negligently, inadvertently or carelessly failing to preserve the written list of changes. But that is not bad faith. *Greenwold*, 189 Wis. 2d at 68-70. *See Youngblood*, 488 U.S. at 58.

The evidence simply does not support any finding that Holzrichter was aware of any potentially exculpatory value of the evidence, and made a conscious effort to suppress it, which would be necessary to conclude that she acted in bad faith. *See Weissinger*, 355 Wis. 2d 546, ¶ 10; *Greenwold*, 189 Wis. 2d at 69.

Indeed, there is nothing in the evidence that would even offer Holzrichter a motive for suppressing evidence in a case that was from a different jurisdiction.

This Court should conclude that Holzrichter did not act in bad faith in failing to preserve MW's written list of changes.

2. Detective Harris did not act in bad faith.

Detective Harris testified at the postconviction hearing that she never attempted to get a copy of MW's list of changes

from anyone in Kansas because that list did not appear to her to be significant. (143:63-64.)

The circuit court found Harris' testimony regarding her perception of the list as insignificant to be incredible. (121:24.) The State completely disagrees with this finding, but recognizes that it is bound by the finding on appeal.

However, findings of fact cannot be based solely on negative inferences that the facts are the opposite of a witness' incredible testimony. *State v. Nichelson*, 220 Wis. 2d 214, 223-25, 582 N.W.2d 460 (1998). And here there is no affirmative evidence that Harris acted in bad faith to suppress any evidence.

Here, it appears that although Harris listened to the second interview on the telephone, she ended her participation in the call before MW asked Holzrichter if she could talk about the rest of her list as she was following Holzrichter out of the interview room. (85, Ex. 3:46; 85, Ex. 5; 121:17.)

Thus, it does not appear that Harris was aware at that time that MW had anything more to say about her list, so that there was any reason to ask Holzrichter for a copy of the list.

Besides, even assuming that Harris might have known about MW's request to talk about the rest of her list, there is no evidence Harris thought that simply not asking for a copy of the list at that time would result in the disappearance of the list.

Therefore, it does not appear that Harris' failure to immediately obtain a copy of the list was even negligent, inadvertent or careless, much less a deliberate effort to suppress the list as evidence.

When Harris received a video recording of the second interview, she logged in the DVD as evidence, and filed a short police report regarding the recording. (111.)

Harris reported that MW said at the second interview that everything she said at the first interview was correct with one exception, i.e., Nichols did not suggest that she should take off her clothes. (111.)

Harris' report was correct. The change Harris reported was in fact the only change MW made on the video recording of the second interview.

Harris did not report that MW indicated as she was leaving the interview room that she wanted to talk about more changes.

But jumping to the conclusion that this omission shows a bad faith effort to suppress evidence is completely unjustified. Ignoring Harris' explanation for the omission, i.e., that she did not think the list was significant, leaves the record completely bare of any other explanation for the omission. With no other explanation available, it is as or more reasonable to conclude that the omission was negligent, inadvertent or careless, as it would be to speculate that it was intentional.

Besides, even if Harris might have believed that simply not mentioning MW's list in her police report would result in the suppression of the evidence, there is nothing in the record to support a finding that this omission actually resulted in the loss of the list.

Harris' report is dated January 23, 2012, a month after the second interview. (111.)

Given the fact that the last known location of the list was in MW's hand as she left the interview room, and that none of the authorities in Kansas have been able to locate it in their files (85, Ex. 5; 141:103-06; 143:63, 65-67) it is reasonable to infer that none of these authorities ever took or maintained possession of the list, and that there was a failure to preserve the list on December 22, 2011, when the second interview ended. As the circuit court found, the list was never preserved. (121:19, 21.)

So even if Harris might have acted in bad faith by omitting any mention of the list in her report a month later, any bad faith on her part could not have been responsible for the failure to preserve a list that had already been lost.

This Court should conclude that there is no basis in the record for finding that MW's list was not preserved because of any bad faith actions by Detective Harris.

3. The prosecutor did not act in bad faith.

The circuit court found that the prosecutor acted in bad faith by failing to find and turn over MW's list to the defense in response to an order to find and turn over exculpatory evidence, including evidence in the possession of the Kansas Child Advocacy Center. (121:25-26.)

But as discussed above, MW's list was not apparently exculpatory, so the prosecutor had no obligation to find it or disclose it to Nichols. *Harris*, 272 Wis. 2d 80, ¶¶ 12-16 (and cases cited). The prosecutor has no obligation to find or disclose evidence that is only potentially exculpatory. *Harris*, 272 Wis. 2d 80, ¶¶ 12-16 (and cases cited).

Moreover, by the time the court entered this order in April 2013, it does not appear that MW's list was any longer in the possession of any of the authorities in Kansas. (121:19, 21.)

A court cannot find bad faith simply because the prosecutor does not do something he has no legal duty to do.

As far as the record shows, the prosecutor preserved all the physical evidence in his possession, and scoured the rough police notes to find any potentially exculpatory information, as required by the court.

There is absolutely nothing whatever in the record to support the circuit court's unfounded conclusion that the prosecutor acted in bad faith.

This Court should find that the prosecutor did not act in bad faith.

Since no agent of the State acted in bad faith to consciously suppress the list of changes to MW's statements at the first interview, Nichols' right to due process was not violated by the possible failure to preserve this list.

C. Nichols was not denied the effective assistance of counsel.

Because Nichols' right to due process was not violated by the failure to preserve apparently exculpatory evidence, or by the failure in bad faith to preserve potentially exculpatory evidence, Nichols was not prejudiced by his attorney's failure to raise any issue regarding the State's failure to preserve MW's list of changes.

In the absence of any prejudice, Nichols was not denied the effective assistance of counsel by his attorney's failure to raise this issue.

CONCLUSION

Because Nichols' right to due process was not violated by the failure to preserve apparently exculpatory evidence, or by the failure in bad faith to preserve potentially exculpatory evidence, Nichols is not entitled to any remedy.

Because the circuit court erred by finding that there was a due process violation, the State's remedy should be reversal of the order vacating the judgment of conviction and dismissing the case with prejudice, and reinstatement of Nichols' conviction and probation.

Date: April 25, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,823 words.

Dated this 25th day of April, 2016.

_____

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of April, 2016.

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