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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. Nichols has failed to refute the State's argument that the circuit court erred by ruling that the State intentionally suppressed apparently exculpatory evidence.

The parties agree that unpreserved evidence is apparently exculpatory when the evidence possessed exculpatory value that was apparent before it was lost, and the defendant is unable to obtain comparable evidence by other means. *E.g., State v. Munford*, 2010 WI App 168, ¶ 21, 330 Wis. 2d 575, 794 N.W.2d 264.

In its opening brief the State showed that the relevant factual findings of the circuit court regarding the alleged exculpatory nature of the unpreserved evidence are clearly erroneous. They are unsupported by the evidence in the record, which supports contrary findings.

Nichols has not attempted to respond to the State's arguments by demonstrating how any of the circuit court's factual findings might be correct. He has not attempted to demonstrate how any of those findings are supported by any evidence. He has not attempted to show why the evidence does not actually support contrary facts, as the State contends.

Nichols has not shown how the evidence supports a finding that the unpreserved evidence ever had any exculpatory value, much less some exculpatory value that was apparent before it was lost.

Nichols also fails to demonstrate how the evidence supports a finding that he was unable to obtain comparable evidence. Nichols does not cite any evidence in the record explaining why he was unable to obtain either MW's original list of changes, or a duplicate or recreated list.

Therefore, Nichols has not shown why the circuit court's conclusion that the unpreserved evidence was apparently exculpatory is not clearly wrong.

Because the circuit court's conclusion that the unpreserved evidence was apparently exculpatory cannot be sustained on appeal, the question consequently becomes whether the evidence was deliberately suppressed in bad faith or only negligently, inadvertently or carelessly lost. *E.g., State v. Greenwold*, 189 Wis. 2d 59, 68-70, 525 N.W.2d 294 (Ct. App. 1994).

Nichols faults the State for relying on civil cases which specifically articulate the standard for reviewing conclusions that someone acted in bad faith.

But he fails to explain why bad faith in a civil case is any different from bad faith in a criminal case. He fails to explain why bad faith conduct by someone who is a private citizen is any different from bad faith conduct by someone who is a public servant.

Nichols cites *State v. Lamon*, 2003 WI 78, 262 Wis. 2d 747, 664 N.W.2d 607, for the proposition that the clearly erroneous standard is applied when reviewing a finding of discriminatory intent. But that is because this kind of finding is largely a credibility question, depending on whether the prosecutor's race-neutral explanation for striking a juror should be believed. *Lamon*, 262 Wis. 2d 747, ¶¶ 43-44.

A finding of whether an action was intentional or negligent depends on all the circumstances, not just a state agent's explanation. It is not just a credibility question but a question of the sufficiency of all the relevant evidence. And a question of the sufficiency of the evidence is a question of law. *Lemke v. Lemke*, 2012 WI App 96, ¶ 28, 343 Wis. 2d 748, 820 N.W.2d 470; *State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis. 2d 43, 717 N.W.2d 676; *State v. Fleming*, 38 Wis. 2d 365, 368, 156 N.W.2d 485 (1968).

In any event, a case imposing one standard of review in an analogous situation cannot supersede cases imposing a different standard of review in the same situation before the court.

Nichols' reliance on *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994), is misplaced because that case applied a rule that is foreign to Wisconsin jurisprudence, i.e., that the clearly erroneous standard applies when factual issues predominate where there is a mixed question of law and fact. *Bohl*, 25 F.3d at 909.

Besides, federal cases cannot overrule Wisconsin cases on the same point.

Bad faith is bad faith. And there is no logical reason why the standard of review applied in Wisconsin civil cases should not also be applied in criminal cases. *See* Wis. Stat. § 972.11(1) (the rules of practice in civil actions apply in criminal actions unless the context of a rule manifestly requires a different construction).

But even if the clearly erroneous standard applied to findings of bad faith, the circuit court's finding that Holzrichter intentionally terminated her interview of MW when it became apparent that the girl wanted to present exculpatory evidence would be clearly erroneous.

Nichols does not address the primary source of evidence regarding Holzrichter's intentions at the end of the interview, i.e., her own words and actions at the time recorded verbatim.

The video recording of the interview shows that Holzrichter did not consider MW's changes to be exculpatory. (85, Ex. 5.) It is also obvious that Holzrichter ended the interview because she did not want to waste any more time on a case that did not matter to her. (85, Ex. 5.)

Holzrichter did not want to suppress additional evidence. She just didn't care about any additional evidence.

The circuit court's findings that a detective and the district attorney acted in bad faith would be clearly erroneous because they are not supported by any evidence.

Nichols does not point to any evidence that would support such accusations of unprofessional conduct.

Nichols has not refuted the State's argument that the circuit court erred at every step of the analysis by ruling that agents of the State intentionally suppressed apparently exculpatory evidence.

II. The notice of appeal was properly filed by the district attorney, giving the court of appeals jurisdiction over this appeal.

Nichols' contention that the district attorney was not authorized to file the notice of appeal is wrong because it is based on an erroneous reading of Wis. Stat. § 165.25(1), listing the duties of the Department of Justice.

Although the title to that section suggests that the department represents the State in appeals, the title is not part of the statute. *State v. Smith*, 2009 WI App 16, ¶ 13 n.9, 316 Wis. 2d 165, 762 N.W.2d 856.

The text of the statute reads somewhat differently. The text states that the department is to "appear for the state and prosecute or defend all actions or proceedings, civil or criminal, in the court of appeals." Wis. Stat. § 165.25(1).

In other words, the attorney general represents the State in the court of appeals, and does those things that are done to litigate a case in the court of appeals, including filing papers that are filed in the court of appeals. This responsibility is the same whether a case is civil or criminal.

Defendants in felony cases are required to serve the attorney general with papers they file in the court of appeals. Wis. Stat. § (Rule) 809.80(2)(b).

The district attorneys are directed to prosecute criminal cases in the circuit courts for their counties. Wis. Stat. § 978.05(1). In other words, district attorneys do those things that are done to litigate a case in the circuit court, including filing papers that are filed in the circuit court.

A notice of appeal is a document that is filed in the circuit court. Wis. Stat. § (Rule) 809.10(1). The clerk of the circuit court sends a copy of the notice of appeal to the court

of appeals. Wis. Stat. § (Rule) 809.11(2), (3). Consequently, it is the district attorneys that are to file a notice of appeal in the circuit court as part of the prosecution of a criminal case in their county.

Furthermore, Wis. Stat. § 974.05(3) specifically directs district attorneys to serve a copy of the notice of appeal on the defendant.

Statutes must be read together, and read reasonably to avoid unreasonable results. *State v. Schaefer*, 2008 WI 25, ¶ 55, 308 Wis. 2d 279, 746 N.W.2d 457; *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. It would be unreasonable to construe these statutes to provide that the attorney general must file a notice of appeal, but that the district attorney must serve a copy of the notice of appeal that the attorney general has filed.

This is especially true since Wis. Stat. § 801.14(4) provides that the filing of a paper constitutes a certification by the attorney filing it that it has been timely served. An attorney filing a notice of appeal could not reasonably certify that a copy of that document has been served by a different attorney in a different office in a different city over whom the filing attorney has no supervisory control.

Thus, § 974.05(3) assumes that district attorneys are the ones who file a notice of appeal because they are the ones who serve a notice of appeal.

Wisconsin Stat. § (Rule) 809.30(2)(h) makes this clear when the defendant appeals, providing that the defendant is to file a notice of appeal in the circuit court and serve a copy on the prosecutor, who represents the State in that court at that time. If the defendant both files a notice of appeal and serves it on the prosecutor, it follows that the prosecutor should file a notice of appeal and serve it on the defendant.

Nichols alludes to three instances in which a person files a paper but the court serves it. (Resp't's Br. 15.) But in all three instances, the court serves a petition for release

only when an institutionalized person is without counsel. Again, the clear implication is that when an attorney is involved in the institution of a proceeding, the attorney both files and serves the pleading.

All in all, it is plain under the statutory scheme that the district attorney files a notice of appeal in the circuit court, while the attorney general takes over the prosecution of the appeal in the court of appeals once that court has jurisdiction.

Moreover, Nichols fails to adequately explain why the filing of a notice of appeal by the wrong attorney would have any effect on the jurisdiction of the court of appeals.

The court of appeals acquires jurisdiction when a notice of appeal is timely filed. Wis. Stat. § (Rule) 809.10(1)(e).

Nothing in § 809.10(1)(e) suggests that jurisdiction depends on the timely filing of a notice of appeal by the right attorney. Indeed, the next subsection of this rule provides that an inconsequential error in the content of a notice of appeal is not a jurisdictional defect. Wis. Stat. § (Rule) 809.10(1)(f).

Although a notice of appeal may be ineffective if it is filed by someone who is unauthorized to act as an attorney, there is no logical reason why a notice of appeal should be jurisdictionally defective just because it is filed by one attorney who is statutorily authorized to represent the State rather than by another attorney who is statutorily authorized to represent the State.

Finally, Nichols' argument that a motion to dismiss cannot be denied by a single judge under the operating procedures of the court of appeals is moot since that issue has now been raised in his brief on the merits, and will be decided by the three-judge panel deciding the merits of this case.

In any event, this Court's reasonable construction of its own rule is controlling. *Orion Flight Serv. v. Basler Flight*

Serv., 2006 WI 51, ¶ 60, 290 Wis. 2d 421, 714 N.W.2d 130. *Hillhaven Corp. v. DHFS*, 2000 WI App 20, 232 Wis. 2d 400, ¶ 12 & n.6, 606 N.W.2d 572.

III. The State's appeal is persuasively meritorious.

An appeal by the State is not frivolous just because a defendant with retained counsel must bear the cost of attempting to defend from the scrutiny of review his undeserved win in the circuit court.

Rather, an appeal is frivolous when an attorney knew or should have known that the appeal had no reasonable basis in the law. *Baumeister v. Automated Products, Inc.*, 2004 WI 148, ¶ 25, 277 Wis. 2d 21, 690 N.W.2d 1. The question centers around what the appellant knew or should have known about the facts and the law regarding its arguments. *Lessor v. Wangelin*, 221 Wis. 2d 659, 667, 586 N.W.2d 1 (Ct. App. 1998).

Whether an appeal is frivolous is a matter of law. *Lessor*, 221 Wis. 2d at 666. *See Baumeister*, 277 Wis. 2d 21, ¶ 25. An appeal will not be found frivolous unless the entire appeal, not just one argument, is frivolous. *Baumeister*, 277 Wis. 2d 21, ¶ 26. Doubts should be resolved against a finding of frivolity unless the appeal is brought solely for purposes of harassment or malicious injury, or without any reasonable basis. *Baumeister*, 277 Wis. 2d 21, ¶ 28.

Nichols' criticism seems to be based on a misunderstanding of the State's argument. He asserts that the State has conceded that this Court is bound by the factual determinations of the circuit court. (Resp't's Br. 23.) But that is exactly the opposite of the State's argument, which is that the circuit's court's factual findings are not binding because they are plainly wrong.

Nichols also seems to misunderstand the law regarding the State's arguments. While Nichols does not appear to question the rule that factual findings are not

binding when they are clearly erroneous, he seems to think that factual findings based on inferences are immune from review on appeal. But that is not the law.

The law is that factual findings based on inferences will not be disturbed when more than one reasonable inference can be drawn from the credible evidence. *E.g., Lessor*, 221 Wis. 2d at 667.

However, inferences must be reasonable and not conjectural. *Garcia v. State*, 73 Wis. 2d 174, 182, 242 N.W.2d 919 (1976), *disapproved of on other grounds, State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). Fact finders may not indulge in inferences unsupported by the evidence. *State v. King*, 120 Wis. 2d 285, 293, 354 N.W.2d 742 (Ct. App. 1984). And unreasonable inferences need not be accepted as true. *Acevedo v. City of Kenosha*, 2011 WI App 10, ¶ 7, 331 Wis. 2d 218, 793 N.W.2d 500.

Consistent with existing law, it is the State's position on this appeal that the circuit court's factual findings are clearly erroneous, that its inferences are unreasonable and unsupported by the evidence, and that its conclusions of law are plainly wrong as a result.

Thus, the State contends that the circuit court's finding that Holzrichter immediately recognized MW's written "corrections" as exculpatory is not supported by the evidence, so that if it is viewed as a finding of fact it is clearly erroneous, and if it is viewed as an inference it is unreasonable. (Appellant's Br. 23.)

The question of whether MW's credibility was eroded or elevated by the circumstances of the second interview is neither a finding of fact nor an inference, but a legal conclusion about the effect of undisputed evidence, which is not entitled to deference on appeal. *See* 75A Am. Jur. 2d *Trial* § 629 (Aug. 2016 update).

Whether the result of the trial would have been changed by the unpreserved evidence is also a conclusion of

law. *See State v. Thiel*, 2003 WI 111, ¶ 23, 264 Wis. 2d 571, 665 N.W.2d 305.

The State never argued that Nichols could have gotten MW to write her list again. The State's argument is that Nichols had the burden to prove that he was unable to obtain comparable evidence by other reasonably available means, and that he failed to prove that he could not get MW to provide or recreate her list.

As previously discussed, whether any of the State's agents acted in bad faith calls for conclusions of law to which the decision of the circuit court is owed no deference. To the extent that Nichols wants to label these determinations questions of fact, they are clearly erroneous. To the extent that Nichols wants to label these determinations inferences, they are unreasonable and unsupported by the evidence.

The conclusion that Nichols failed to prove that his attorney was ineffective follows from his failure to prove that he was prejudiced by his attorney's failure to make arguments that had no merit. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

If the State's arguments are so frivolous, why hasn't Nichols attempted to refute them? Why does he rely exclusively on conclusory comments instead of directly addressing the State's arguments that the findings of the circuit court, whether findings of fact, inferences or legal conclusions are unsupported by the evidence in the record and therefore plainly wrong?

The answer is that the circuit court's findings throughout its lengthy opinion are plainly wrong. There is more room to be wrong in a lengthy opinion than in a short one.

The answer is that on this record there has been no showing that any exculpatory evidence ever existed. There has been no showing that any evidence was irretrievably lost. There has been no showing that any evidence, exculpatory or otherwise, was deliberately destroyed by

anyone in bad faith. There has been no showing of any good reason why Nichols' conviction should have been reversed with prejudice.

CONCLUSION

It is therefore respectfully repeated that the order of the circuit court should be reversed, and Nichols' conviction of sexually assaulting a child should be reinstated.

Dated August 18, 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), (c) for a brief produced with a proportional serif font. The length of this brief is 2,899 words.

Dated this 18th day of August, 2016.

_____
THOMAS J. BALISTRERI
Assistant Attorney General

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 18th day of August, 2016.

_____
THOMAS J. BALISTRERI
Assistant Attorney General