STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal Case No. 2024AP737

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Jeffrey A. Roth,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE PAUL F. REILLY FREDERICK J. STRAMPE, PRESIDING

Case No. 2019CF466

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Did the circuit court properly deny Roth's motion to dismiss, which alleged the City of Oconomowoc Police Department destroyed apparently exculpatory and potentially exculpatory evidence in the form of body and squad camera footage?

Trial court answered: The court found at the conclusion of three separate motion hearings that the City of Oconomowoc

Police Department did not fail to preserve evidence that was apparently exculpatory, and further found the police department did not act in bad faith by failing to preserve evidence that was potentially exculpatory.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. § 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. §809.23(1)(b)4.

STATEMENT OF THE CASE

On April 1st, 2019, Sergeant Bradley Timm (who had been promoted to the rank of Captain by the jury trial date), Officer John Resch, and Officer Mitchell Karleski of the City of Oconomowoc Police Department responded to a report of a suspicious person who had been stumbling around and was now sitting in a vehicle parked on Riverdale Drive in the City of Oconomowoc.[1] (R. at 1:2.) When officers arrived, they made contact with the Defendant Jeffrey A. Roth who was sleeping in the driver's seat of said vehicle. (R. at 1:2.) After detecting the odor of marijuana, the officers opened the vehicle's driver's side door to check on the wellbeing of Roth. (R. at 1:2-3.) After being awakened and told several times to exit the vehicle, Roth was tased, removed from the vehicle, and placed under arrest. (R. at 1:3.) Officers searched the vehicle and located a significant amount of marijuana shake, a grinder, and a "one-hitter" glass pipe used to smoke marijuana. (R. at 1:3.) After the arrest and subsequent search, while en route to the

[1] Officer Mitchell Karleski testified at the motion hearing that occurred on November 14, 2022 as well as during the jury trial. In the motion hearing on November 14, 2022, Officer Karleski's name was spelled in the transcript incorrectly as "Mitchel Carleski." (R. at 61:34-35). The State utilizes the correct spelling of Officer Karleski's in its brief.

Waukesha County Jail, Roth said to Officer Resch, "I'll kill you if you ever tase me again. I will put a bullet in your head if you try to tase me again." (R. at 1:3.) All of this occurred while Roth was pending on Waukesha County case 2018CM002468 for Endangering Safety by Use of a Weapon. (R. at 1:3.)

On April 2nd, 2019, Roth was charged in Waukesha County Case 2019CF000466. This complaint charged him with five counts: Count One, Battery or Threat to an Officer of the Court or Law Enforcement Officer; Count Two, Possession of THC; Count Three, Possession of Drug Paraphernalia; Count Four, Resisting an Officer; and Count Five, Misdemeanor Bail Jumping. (R. at 1:1-2.) On May 29th, 2019, Roth waived his Preliminary Hearing and was bound over for trial. (R. at 11:1, R. at 134:1-6.)

On June 15th, 2021, Roth filed a Motion for Dismissal Due to Destruction of Evidence. (R. at 29:1-3.) Roth had not received body or squad car camera footage from the incident on April 1st, 2019, and alleged that this footage had been destroyed. (R. at 29:1-3.) The State filed a response on June 22nd, 2021. (R. at 31:1-5.) The first hearing on these motions occurred on March 21st, 2022. (R. at 44:1-50.) Formerly Sergeant, and now at the time of trial Captain Bradley Timm was the sole witness called to the stand on this date. (R. at 44:1-50.) Captain Timm testified that he had not performed a pre-shift inspection of his camera systems (as proscribed in the Oconomowoc Police Department's written policy) before responding to this dispatch because he had to quickly leave a training session. (R. at 44:20-21.) He went on to say that at that time, the Oconomowoc Police Department had been experiencing "major issues" with their now defunct camera system provider, Data 911. (R. at 44:23.) As to his body camera, Captain Timm testified that it had not recorded and therefore no body camera video uploaded to the Oconomowoc Police Department's server. (R. at 44:32-33, 35.) As to his squad car camera, he testified that this had successfully recorded and uploaded to the server but the footage was

permanently and automatically deleted due to the department's 120 day retention policy. (R. at 44:32-33, 39.)

Captain Timm's testimony continued at the next evidentiary hearing on this issue on May 27th, 2022. (R. at 43:1-65.) During cross-examination, Captain Timm testified that his body camera did not malfunction during the upload process but rather had not recorded anything. (R. at 43:38.) He also testified that the body and squad camera upload process is fully automated, occurring when the units enter the range of the police station's wireless internet network. (R. at 43:38.) Additionally, he testified that this was not the only occasion where he received an emergency dispatch at the start of his shift and had to respond without performing his pre-shift equipment inspection. (R. at 43:40.)

Officer John Resch also testified at this second motion hearing. (R. at 43:49-63.) His testimony included that he believed his camera systems were functioning normally before, during, and after his encounter with the Roth. (R. at 43:53-54.) He testified that his squad camera had been uploading. He testified he did not realize the body camera had not been recording until later reviewing his report. (R. at 43:63.) Additionally, he testified that there was no way by which he could have interfered with the uploading process had something recorded. (R. at 43:54-55.) Officer Resch's testimony was continued to a third motion hearing and Judge Paul F. Reilly presided over this hearing on behalf of Judge Laura Lau.

At the third and final hearing on this issue on November 14, 2022, Officer Resch testified that he did not delete or edit any camera footage, nor did he have the ability to. (R. at 61:26-27.) He also testified that he was not responsible for administering the Department's 120 day retention policy, and he had no idea if any footage was ever captured by any camera. (R. at 61:22, 26-27.) Consistent with Captain Timm's testimony, he stated that the Oconomowoc Police Department had many problems with these camera systems and this was far

from the only time they had these camera issues. (R. at 61:27-28, 32.)

Officer Karleski was the third and final officer to testify at these motion hearings. In response to a question asking whether he had reason to believe his camera systems were not functioning, he testified, "I have great reason to believe that it didn't record or upload or any of that, because that equipment was having several bugs and issues with it, again, since day one". (R. at 61:46.) He testified that on the night of the incident, he was neither aware of any problems with his camera systems nor was he aware of whether anything had recorded. (R. at 61:49-50.) He testified that he had neither reviewed nor deleted any footage from the incident. (R. at 61:50.)

After testimony concluded and both Roth and the State made arguments, Judge Reilly issued his oral decision regarding Roth's motion. A selection follows:

> It's very, very clear to the Court in this case that there was no ill motive on the part of the Oconomowoc PD, other than the fact that they were probably somewhat discouraged by getting Data 911, who I believe as Captain Timm indicated, they started with that program in 2013 and they almost immediately had problems throughout. And in contrast to some of the defense arguments, they made efforts to try-- and obviously they wanted to make the machines work correctly because it only causes aggravation to them and to their officers. So they were, as the testimony showed, working with 911 to try and fix the problems they were having.

(R. at 61:76-77.) Judge Reilly concluded that the upload process had not functioned properly on the night of the incident, through no fault of the officers. (R. at 61:74-78.) Therefore, the Oconomowoc Police Department had not failed to preserve apparently exculpatory evidence, nor did they act in bad faith in failing to preserve potentially exculpatory

evidence, and therefore he denied Roth's Motion for Dismissal Due to Destruction of Evidence. (R. at 61:78.)

The matter proceeded to trial on April 18th, 19th, and 20th of 2023. (R. at 131:1-124, 135:1-225, 136:1-150.) At this point in the proceedings, Judge Frederick J. Strampe had been appointed by the Governor and assigned to Judge Lau's calendar, and presided over the jury trial in this matter. Captain Timm, Officer Resch, and Officer Mitchell Karleski testified in the presence of the jury and were subject to cross-examination. Additionally, Roth called Ivan Lam to testify, Information Technology Coordinator for the City of Oconomowoc who served as custodian of all body and squad car camera footage for the Police Department. (R. at 135:197-220.) Lam testified that he was the only person with the ability to delete any footage on the Police Department's server, that no one ever asked him to delete any footage from this incident, and he did not delete any footage from this incident. (R. at 135:219-220.) The only way an officer could have prevented footage from uploading, he testified, would have been to wrap their squad car in aluminum foil or something similar to prevent wireless signals from transmitting. (R. at 135:220-221.)

Roth was convicted of Count Three, Possession of Drug Paraphernalia and Count Four, Resisting an Officer. He was acquitted of Count One, Battery or Threat to an Officer of the Court or Law Enforcement Officer and Count Five, Misdemeanor Bail Jumping. (R. at 136:145-146.) Judge Strampe dismissed Count Two, Possession of THC, at the conclusion of the State's case in chief. (R. at 136:11). On Count 3, Roth was fined $100 and ordered to pay court costs. On Count 4, Roth was sentenced to 40 days jail. On June 2, 2023, Judge Strampe granted a stay of the sentence pending appeal (R. at 103:2.)

This appeal follows.

STANDARD OF REVIEW

Whether Roth proved a due process violation is a question of law reviewed independently by this Court. *State v. Luedtke*, 2015 WI 42, ¶ 37, 362 Wis. 2d 1, 863 N.W.2d 592. This Court reviews that question of law in light of the trial court's findings of fact which must stand unless they are clearly erroneous. *Id*. These findings of fact are clearly erroneous when they are unsupported by the record. *Royster-Clark, Inc. v. Olsen's Mill, Inc.,* 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530.

ARGUMENT

The circuit court correctly denied Roth's motion to dismiss because the purge of the squad cameras from the City of Oconomowoc's server did not violate his due process rights.

I. Destruction of evidence violates a defendant's due process rights only when the evidence was apparently exculpatory, or when the evidence was potentially exculpatory and the destruction occurred in bad faith.

In general, prosecutors must disclose evidence to the defense if the evidence is material to either guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). This rule does not create an absolute requirement that the State preserve all evidence in a case, however. A defendant's due process rights are violated if the police: (1) failed to preserve evidence that is apparently exculpatory; or (2) failed to preserve evidence which is potentially exculpatory, and they did so in bad faith. *State v. Greenwold* (*Greenwold II*), 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994).

To prove that the State destroyed apparently exculpatory evidence in violation of due process, a defendant "must demonstrate that: (1) the evidence destroyed 'possess[ed] an exculpatory value that was apparent to those who had custody of the evidence . . . before the evidence was destroyed,' and (2) the evidence is 'of such a nature that the defendant [is] unable

to obtain comparable evidence by other reasonably available means.'" *State v. Munford*, 2010 WI App 168, ¶ 21, 330 Wis. 2d 575, 794 N.W.2d 264 (citation omitted). Lost or destroyed evidence is not considered apparently exculpatory if it would have provided "simply an avenue of investigation that might have led in any number of directions." *Hubanks v. Frank*, 392 F.3d 926, 931 (7th Cir. 2004) (quoting *Youngblood*, 488 U.S. at 57 n.*).

To prove that the State failed to preserve potentially exculpatory evidence in bad faith, a defendant must demonstrate that (1) the officers were aware of the potentially exculpatory value of the evidence that they failed to preserve, and (2) they "acted with official animus or made a conscious effort to suppress exculpatory evidence." *Greenwold II*, 189 Wis. 2d at 66, 69. A negligent failure to preserve evidence does not establish bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Greenwold II*, 189 Wis. 2d at 68–69. When alleging a violation concerning evidence that is only potentially exculpatory, the defendant has the burden to prove the police acted in bad faith. *Greenwold II*, 189 Wis. 2d at 70.

II. The squad camera videos were not apparently exculpatory.

When looking at whether evidence is "apparently exculpatory" a court must determine "if the materiality of the evidence rises above being potentially useful to clearly exculpatory." *State v. Huggett*, 2010 WI App 69, ¶ 11, 324 Wis. 2d 786, 783 N.W.2d 675 (Ct. App. 2010) (quoting *Greenwold II*, 189 Wis. 2d at 68, 525 N.W.2d 294) (internal quotations omitted). The "mere possibility" that the evidence might be exculpatory does not mean the evidence was apparently exculpatory. *Munford* at ¶23. In *Huggett*, the Court of Appeals affirmed an order of the trial court to dismiss a single count of second degree intentional homicide after the State was found to have failed to preserve a threatening voicemail message from the victim to the defendant. *Id.* ¶ 1. During the homicide investigation wherein Huggett claimed

self-defense, Huggett alerted officers to the threatening voicemails and texts on their cell phones from the victim prior to the shooting, and Huggett explained he only shot the victim in self-defense. *Id.* ¶¶ 4-6. One officer actually listened to the threatening voicemail on Kerbel's phone almost immediately upon arrival at the residence, and took the cell phone with an understanding that it had evidentiary value. *Id.* ¶ 4. While certain text messages on each of Huggett's and Kerbel's phones were preserved by the police, there were no threatening voicemail messages preserved. *Id.* ¶ 9. The circuit court dismissed the case with prejudice due to the State's failure to preserve the voicemail messages. *Id.* ¶ 10.

The Court of Appeals affirmed the trial court's dismissal, and in its reasoning stated that it was "reasonable for Huggett to expect that the State would preserve the voicemail recordings." *Id.* ¶ 17. Further, the Court found that "the sheriff's department was immediately aware of the apparently exculpatory value of the evidence and confiscated the cell phones as part of its investigation." *Id.* The Court further emphasized that there was no comparable evidence available either through witness testimony or the preserved text messages. *Id.* ¶ 22. The Court concluded that Huggett met the standard to demonstrate that his due process rights were violated by not preserving the voicemails as the evidence was apparently exculpatory, and dismissal of the homicide charge was an appropriate remedy. *Id.* ¶ 25.

State v. Hahn is instructive as an example of a due process violation created by the State destroying apparently exculpatory evidence. The State had a duty to preserve the Defendant's truck, as its seizure of the truck demonstrated the State's knowledge of its exculpatory value. *State v. Hahn*, 132 Wis. 2d 351, 360, 392 N.W.2d 464, 467 (Ct. App. 1986). The truck at issue was the Defendant's sole means of proving his affirmative defense that the car accident would have occurred absent his intoxication. *Id.* He did not have an ability to present comparable evidence. *Id.* Additionally, since the State was aware of the evidence's exculpatory value (meaning the

evidence was apparently exculpatory), a bad faith analysis was not necessary and the mere fact the evidence was destroyed was sufficient to establish a due process violation. *Luedtke* at ¶57.

In contrast to *Huggett* and *Hahn*, the Wisconsin Court of Appeals held in *State v. Kircher*, 189 Wis. 2d 392, 404, 525 N.W.2d 788 (Ct. App. 1994), that the destruction of a 911 tape did not violate the defendant's due process rights. In *Kircher*, the defendant struck a pedestrian on a highway with his vehicle, and then proceeded to call 911 to report the accident. *Id.* at 396. The 911 call was recorded, but not preserved. *Id.* The defendant was ultimately found to have a blood alcohol concentration (BAC) above 0.10 percent at the time of the accident, and was subsequently charged. *Id.* at 396-97. The defendant wanted to use the 911 call to "illustrate[] that he was alert and in full possession of his faculties, notwithstanding his intoxication, thereby establishing a defense under § 940.09(2), STATS." *Id.* at 402.

The Court held that even "[a]ssuming, without deciding, that the 911 tape recording possessed an exculpatory value that was apparent before it was destroyed, Kircher's argument fails because he was able to obtain comparable evidence by other reasonably available means." *Id.* Specifically, the Court found that the defendant could present testimony from police officers and the 911 telecommunicator who answered the defendant's call, as they were able to testify that the defendant was alert and did not show indications of intoxication. *Id.* at 402-04. Because there was comparable evidence to the 911 call, the Court did not believe a due process violation occurred even though the 911 call was destroyed and potentially had exculpatory value. *Id.* at 404.

The squad camera footage in Roth's case is not apparently exculpatory, and can be distinguished from *Huggett* and *Hahn*. There is no support in the record for the officers' knowledge of the evidence's exculpatory value. The facts in Roth's case aligns with the court's analysis in *Kircher*. Even if, for the sake of argument, the squad camera held apparently

exculpatory value, there was not a due process violation because squad camera was not the sole means of obtaining comparable evidence. The police officers testified and were subject to cross-examination, and defense was provided the police reports in discovery. Roth fails to explain how the squad camera videos were apparently exculpatory at the time of the destruction and fails to explain what they would have showed that could not have been explained by the officers during testimony. Thus, the court must engage in a bad faith analysis. In doing so, the record demonstrates only negligence as opposed to official animus or conscious actions to destroy evidence.

III. The police did not act in bad faith when the squad camera videos were purged because there was no official animus toward Roth, nor was there any conscious effort to suppress the evidence.

In *Youngblood*, 488 U.S. 51, 58, the U.S. Supreme Court held "that 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" under the Fourteenth Amendment to the U.S. Constitution. If evidence is materially exculpatory evidence, and the State fails to disclose the evidence, it is irrelevant whether the State did so in bad faith or good faith. *Id.* But, the Court stated that "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said then that it could have been subjected to tests, the results of which *might have* exonerated the defendant." *Id.* (emphasis added).

The Court reasoned that a defendant is required to show bad faith by the police, because it "limits the extent of the police's obligation to preserve evidence to a reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it." *Id.* at 58. The Court specifically did not impose on police "an undifferentiated and absolute duty to retain and to preserve all material that might be of

conceivable evidentiary significance in a particular prosecution." *Id.* Negligence by officers does not rise to the level of bad faith required under *Youngblood*. *See Id.* at 58 (finding that the police's failure to refrigerate clothing and test the semen samples in a sexual assault case was negligent, but did not violate Due Process). See also *State v. Revels*, 2022 WI App 8, 971 N.W.2d 203. (The State presents the unpublished *Revels* decision for persuasive value only. An officer's failure to follow a written office policy is not sufficient to show bad faith for purposes of a due process violation.[2] *Id*. at ¶32-33.

In *Greenwold II*, and its predecessor court of appeals case *Greenwold I*, the State's failures to preserve blood samples and record the scene of a fatal accident caused by an intoxicated driver were at issue. *Greenwold II* at 64, 70. The court of appeals found that while the officers may have been negligent, there was no due process violation and the court reversed the circuit court's dismissal of the charges. *Id.* at 69. The court of appeals made this decision for two reasons. First, officers were not aware of the potentially exculpatory value of the evidence they failed to preserve. *Id.* Therefore, this evidence was merely potentially exculpatory as opposed to apparently exculpatory. *Id.* at 70. Second, the Defendant was only able to show negligence on the part of the officers, as opposed to bad faith, so he was not able to meet his burden under the *Youngblood* standard to demonstrate a due process violation. *Id.* at 70-71. Therefore, the trial court abused its discretion in finding a due process violation and dismissing the case.

Greenwold is similar to the case at hand because the record has only established possible negligence on the part of the Oconomowoc Police Department. Officer testimony in multiple evidentiary hearings, as well as extensive cross-examination at trial, showed that officers made a good-faith

[2] Pursuant to Wis. Stat. Rule 809.23(3)(b) authored, unpublished opinions issued after July 1, 2009, may be cited for persuasive value. In the State's view, *Revels* persuasively interprets exculpatory evidence in the context of squad and body camera recordings deleted from the department's system pursuant to a 120-day retention policy.

effort to ensure their camera systems were recording. The body cameras had been working inconsistently as long as the Department had been using them. (R. at 44:23.) Officer Resch testified at trial he believed his squad camera was working, but remembered attempting to manually turn on the body camera he was wearing because it did not automatically turn on with his squad camera. (R. at 135:77.) Sgt. Timm testified at trial he believed he attempted to turn on his body camera manually. (R. at 131:216.) Law enforcement intended and believed that the cameras would record. The body and squad cameras were designed to automatically upload to the police department's server when they were plugged in and entered the range of the police department's wireless internet network. (R. at 43-37.) The system eliminated the need for officers to manually upload any body or squad camera recordings. The body cameras were not functioning properly, and the squad cameras were removed from the system due to the 120-retention policy.

Luedtke is also instructive. *Luedtke* involved the destruction of blood samples by the Wisconsin State Laboratory of Hygiene pursuant to Laboratory policy. *Id*. ¶¶ 3, 5. The Wisconsin Supreme Court held that "under longstanding Wisconsin precedent, it is clear that the routine destruction of a driver's blood or breath sample, without more, does not deprive a defendant of due process." *Id*. ¶ 46. The court further concluded that the destruction of the blood samples pursuant to Laboratory policy did not demonstrate bad faith because the defendant failed to show "that the State (1) was 'aware of the potentially exculpatory value or usefulness of the evidence [the State] failed to preserve'; and (2) 'acted with official animus or made a conscious effort to suppress exculpatory evidence.'" *Id*. ¶ 55 (quoting *Greenwold II*, 189 Wis. 2d at 69). Also considered by the State Supreme Court was the fact that Luedtke received a fair trial:

> Luedtke cross-examined witnesses and the court gave him an opportunity to call his own expert witness, although he chose not to do so. Luedtke also had the opportunity to tell the jury that he

> was unable to test his blood sample because the Laboratory destroyed it. Luedtke received discovery and additional time from the circuit court to prepare his defense and to seek documents from the Laboratory through an open records request. Although Luedtke was unable to retest the blood sample, he was able to analyze the raw data and methodology that the Laboratory used to test the sample.

Id. at ¶60.

There is insufficient evidence in the record to find the officers acted in bad faith by not preserving the videos. In the case at hand, there is testimony that the recordings would have just as likely been inculpatory. There is no testimony that the officers were aware of the recordings' exculpatory value at the time they were not preserved. The officers had relied on their common practice and believed the recordings were being preserved. The officers did not have the access needed to delete or modify the squad camera recordings. Nearly all of the factors the *Luedtke* court considered in whether Luedtke received a fair trial are present in Roth's case. Roth was able to elicit a plethora of testimony at trial regarding the lack of body and squad camera recordings and the Oconomowoc Police Department's methodologies for creating and preserving recordings. Roth received ample time to receive discovery and file numerous open records requests. Finally, and perhaps most importantly, Roth was able to cross-examine the officers who witnessed and arrested him for these offenses. The over-arching issue is whether Roth received a fair trial without the squad camera videos. *Luedtke*, 362 Wis. 2d 1, ¶ 58. Roth received a fair trial during which he aggressively challenged the State's case and the State's witnesses on cross-examination.

The record establishes that the Oconomowoc Police Department's written policy at the time required a pre-shift inspection of body and squad camera equipment. (R. at 44:20-21.) However, Roth has made no showing that the failure to follow this policy was anything more than possible negligence.

Sgt. Timm and Officer Resch were extensively questioned about this failure to follow the policy both at evidentiary hearings and in the presence of the jury. They testified that they rushed out of a training session to respond to a call for service. (R. at 44:20-21.) Additionally, Sgt. Timm testified during the motion hearing that this evidence was purely inculpatory and he wished it had been preserved. (R. at 43:39). There is nothing in the record to support that the officers were aware of the recordings' exculpatory value, nor is there evidence of anyone's conscious effort to not preserve the body and squad camera recordings. At best, Roth showed negligence in how the squad camera videos were purged prior to being turned over in discovery. That is not sufficient. *Greenwold*, 189 Wis. 2d at 68–69.

The Defense was allowed to call the City of Oconomowoc IT director, Ivan Lam, to intensively explore the possibility of bad faith. Lam testified that the officers could not prohibit body or squad cameras from being uploaded. (R. at 135:219.) Mr. Lam testified that the **only** possible way officers could have prevented the recordings from uploading would be to wrap their squad cars in tin foil and create a Faraday Box. (R. at 135:220, emphasis added.) Additionally, he testified that the **only** person who had the ability to delete or alter the recordings once they were uploaded to the server was him, and he unequivocally denied doing so. (R. 135:219, 220, emphasis added.) This testimony further demonstrates the lack of conscious effort or official animus by the officers to destroy these recordings, and shows Roth received a fair trial because the jury heard about the retention period and lack of recordings.

There are insufficient facts in this record for the court to conclude a due process violation occurred. There is nothing in the record to suggest the recordings were apparently exculpatory, therefore Roth must attempt to argue the recordings are potentially exculpatory. If a due process violation occurred where potentially exculpatory evidence was not preserved, Roth bears the burden to show the State failed to

preserve, or destroyed, the recordings in bad faith. Roth has failed to meet his burdens.

CONCLUSION

For the reasons discussed, this Court should affirm the circuit court's denial of Roth's motion to dismiss and the judgment of conviction.

Dated this 19th day of September, 2024.

Respectfully submitted,

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Electronically signed by
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19 (8) (b), (bm) and (c) for a brief produced with a proportional serif font. The word count of this brief is 4,738.

Dated this 19th day of September, 2024

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