This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1722

State of Minnesota,
Respondent,

vs.

Brady Kevin Hanson,
Appellant.

Filed October 10, 2022
Affirmed
Bryan, Judge

Polk County District Court
File No. 60-CR-19-185

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Greg Widseth, Polk County Attorney, Clifford B. Wardlaw, Assistant County Attorney, Crookston, Minnesota (for respondent)

Matthew S. Dearth, Vogel Law Firm, Fargo, North Dakota, (for appellant)

Considered and decided by Slieter, Presiding Judge; Bryan, Judge; and Klaphake, Judge.[*]

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

BRYAN, Judge

Appellant challenges the district court's denial of his motion to dismiss the charge against him. Specifically appellant argues that the state acted in bad faith when it attempted to unlock his cellphone, which resulted in the loss of text messages that appellant hoped to use in his defense. Because we conclude that appellant did not establish that the state acted in bad faith, we affirm the district court.

FACTS

In January 2019, respondent State of Minnesota charged appellant Brady Kevin Hanson with burglary in the second degree under Minnesota Statutes section 609.582, subdivision 2(a)(1) (2018), for entering B.Y.'s home without her consent and stealing her dog. According to the complaint, Hanson wanted a romantic relationship with B.Y. Hanson repeatedly contacted B.Y., but B.Y. did not respond to the majority of Hanson's phone calls and text messages. On January 26, B.Y. reported to law enforcement that her dog was missing. B.Y. explained that Hanson called and texted her numerous times and followed her as she drove around Fosston, Minnesota. B.Y. also reported that Hanson sent her a snapchat video of her dog in a vehicle and the message "maybe you'll talk now" appearing across the video. Hanson texted B.Y. threatening to release the dog 200 miles away, in North Dakota. Five days after the dog was taken, B.Y. found it roaming a mile outside of her town. Police ultimately arrested Hanson and confiscated his cellphone.

During the pretrial litigation, Hanson requested that the state disclose evidence obtained from his phone. Hanson expressed his intent to use this evidence—specifically

text messages—to show that B.Y. consented to him entering her residence but stated that he had not received cellphone data from the state. Ultimately, the state informed Hanson that it was not able to retrieve text messages from Hanson's cellphone and Hanson moved to dismiss the charge. At a hearing on Hanson's motion, the district court admitted testimony from Hanson and Polk County Sheriff's Deputy Jesse Haugen.

The evidence presented to the district court and the submissions of the parties to the district court establish the following facts. Between July 29, 2019, and January 14, 2020, the state informed Hanson's counsel that it was "unable to access the defendant's phone because it is password protected." Hanson provided three different possible passcodes to the state and warned "that after five failed attempts, the phone will reset back to factory settings." Hanson also offered to unlock the phone with his fingerprint. On or about December 17, 2019, police attempted the three passcodes, but they did not work. Hanson offered to unlock the phone in person, but on January 8, 2020, the state informed Hanson that "[t]he cellphone reset" and that it "was wiped to the default."

When asked about the standard law enforcement practices at his agency, Deputy Haugen testified that during an investigation, the sheriff's department typically sent phones to a third-party agency for extraction of all cellphone data. Deputy Haugen also testified that he seized Hanson's cellphone because he believed that "there was potential evidence that could have been on that cellphone." According to Deputy Haugen and the information he received from an investigator, the third-party agency could not extract any data until the phone had been unlocked. Deputy Haugen also testified that on December 17, 2020, after receiving the three possible passcodes, he tried to unlock the phone. Deputy Haugen

explained that after the first passcode was entered, a message appeared, but he did not recall what it said. Deputy Haugen explained his process for trying to unlock the phone:

> It was one after the next is what I tried. I physically looked at the code. I had it on my desk. [Another investigator] was near me. He observed me do the pattern and it didn't work, so I said, okay, let's try the second one or the next one, and we tried that, it didn't work, and then we went on to the third code.

After the third attempt, the phone shut off. Deputy Haugen did not recall any wording appearing on the screen before the phone shut off. He emailed the prosecutor to explain what happened. Deputy Haugen testified that he had no way of confirming that the contents of the cellphone were wiped or cleared, but he assumed they were no longer accessible. He also testified that he was unaware of the data contained on the phone and unaware of other attempts to extract the data before or after his attempts in December.

Hanson also testified and stated that B.Y. allowed him to enter her home "quite frequently." Hanson believed that his text messages to her supported this claim. Hanson stated that he had had permission to enter B.Y.'s home to spend time with B.Y., sometimes spend the night, or sometimes to let her dog out when she worked late. Hanson gave three different possible passcodes to unlock the phone, explaining that he "forgot [the passcode] when [he] was asked for it." Hanson stated that he believed one of the three passcodes would unlock the phone and that his phone would allow nine failed attempts to login. Hanson explained that after each failed attempt, he believed a message would appear showing how many attempts remained. Hanson provided no testimony regarding the exact wording of this message. Hanson agreed that he told his attorney that a user had five chances to input the passcode, even though he actually believed the user had nine chances

because he "didn't want it to get higher" and risk losing "all of [the] evidence of [B.Y.] telling [him] to come over and let her dog out." Hanson did not specify the dates of the text messages from B.Y. purporting to give him permission to enter her residence.

On July 23, 2020, the district court denied Hanson's motion to dismiss the case. The district court found that Hanson had not testified regarding when B.Y. gave her permission for him to enter her home or what time period her consent may have covered. More specifically, the district court reasoned that Hanson may have had permission in the past, but B.Y. revoked this permission when she told him that she no longer wanted to have contact with him. The district court determined that Hanson had not established "that [the phone data] would have been material" and, therefore, the evidence "had no apparent and material exculpatory value . . . to invoke the government's duty of preservation." The district court also concluded that Deputy Haugen was not conducting an investigative search when he tried to unlock the phone; he was responding to a discovery request and acted in good faith when "relying on the passcodes that had been provided by [Hanson]."

After a bench trial in May 2021, the district court found Hanson guilty of second-degree burglary. The district court sentenced Hanson to eighteen months' imprisonment but stayed execution of that sentence for three years. Hanson appeals.

DECISION

Hanson argues we should reverse the district court's denial of his motion to dismiss because his due process rights were violated when Deputy Haugen deviated from a standard practice, causing the destruction of the text messages from Hanson's cellphone. Because the evidence does not show that Deputy Haugen deviated from a standard practice

when he inputted the passcodes provided to him by Hanson, we conclude that the state did not act in bad faith.

A defendant's right to due process of law may be implicated if the state loses or destroys material evidence, *State v. Jenkins*, 782 N.W.2d 211, 235 (Minn. 2010), and the prosecution has a duty to disclose "favorable and material" evidence to the defense, *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). However, "unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).[1] The Minnesota and United States Supreme Courts "have previously identified two indices of bad faith: (1) whether the State purposefully destroyed evidence favorable to a defendant so as to hide it; and (2) whether the State failed to follow standard procedures when it destroyed the evidence." *State v. Hawkinson*, 829 N.W.2d 367, 373 (Minn. 2013) (citations omitted). Whether a due-process violation has occurred presents a question of law, which appellate courts review de novo. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012).

In this case, Hanson asserts that the second portion of *Hawkinson* applies, arguing that Deputy Haugen failed to follow the standard practice of having a third-party agency

[1] *Youngblood* distinguishes between the loss of exculpatory evidence (which constitutes a due process violation without regard to whether the state acted in bad faith) and the loss of only "potentially useful evidence" (which constitutes a due process violation only when the defendant establishes that the state acted in bad faith). 488 U.S. at 57-58 (citing *California v. Trombetta*, 467 U.S. 479, 486 (1984)). Hanson characterizes the text messages as potentially useful evidence and concedes he must show bad faith to prevail.

search the phone.[2] We conclude that Hanson has not established that Deputy Haugen intentionally destroyed the text messages in violation of a standard practice.[3] The evidence in the record relates to a single standard practice: Deputy Haugen stated that when extracting all of a cellphone's data during an ongoing criminal investigation, the sheriff's department transfers the phone to a third-party agency. There is no evidence of any policy regarding informally viewing a phone or formally searching a phone for non-investigative purposes, and no evidence regarding any policy for responding to a criminal defendant's discovery request. Likewise, and more importantly, there is no evidence of any policy regarding unlocking a device or prioritizing different methods of unlocking a device, such as using a fingerprint instead of a passcode. Because the conduct in this case involved Deputy Haugen's attempts to unlock the cellphone, we cannot conclude that this conduct deviated from a standard practice absent some evidence of a policy or convention for unlocking a device.

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[2] Hanson does not argue that the first portion of *Hawkinson* applies to the facts in this case or that Deputy Haugen purposefully sought to hide potentially useful evidence.

[3] We are concerned that the record does not establish that the messages Hanson sought were actually destroyed. *See Trombetta*, 467 U.S. at 489 (a defendant must show that they are "unable to obtain comparable evidence by other reasonably available means"); *State v. Heath,* 685 N.W.2d 48, 55-56 (Minn. App. 2004) (same). There is no evidence regarding what happens to text messages upon a "factory reset" or whether the messages remain on the phone but are inaccessible without additional software or expertise. In addition, there is no evidence that the data was also erased from any archive or backups—manual or automatic, whether on Hanson's own storage devices or on an internet server—that may exist. The evidence may also be available through Hanson's service provider or other third party, in addition to B.Y.'s phone. Nevertheless, in light of our decision that the evidence does not establish Deputy Haugen deviated from a standard practice, we need not determine whether the evidence establishes that the data was actually destroyed.

To the extent that portions of Hanson's brief argue that even in the absence of evidence that Deputy Haugen violated a standard procedure, Deputy Haugen's actions were in bad faith because those actions were done after receiving a discovery request and after seeing the phone's warning message, we remain unconvinced for two reasons. First, in *Hawkinson*, the supreme court declined to hold that destruction of evidence after receiving a defendant's discovery request is evidence of bad faith. *Id.* at 375-76. Further, the context of Deputy Haugen's actions undercut Hanson's argument. For instance, Deputy Haugen testified that he hoped Hanson's phone would contain inculpatory evidence and there is no reason to believe that Deputy Haugen would intend to destroy inculpatory evidence. In addition, Deputy Haugen made no attempts to view the contents of the phone until after Hanson provided three incorrect passcodes. Given that context, the sequence of the discovery request occurring prior to the loss of the text messages does not indicate bad faith.

Second, we cannot infer bad faith, as Hansen does, based on the fact that Deputy Haugen inputted the three passcodes, despite the phone's warnings. The evidence contains no evidence of what the warning actually stated, whether it warned of data loss, or whether it described any other consequences of inputting an incorrect passcode. Deputy Haugen's testimony does not establish that he read or understood the warning on the phone; it only shows that Deputy Haugen did not recall what the message said. As noted above, Hanson bears the burden to show Deputy Haugen acted in bad faith. Without knowing the precise language of the error message, we cannot conclude that Deputy Haugen acted in bad faith.

Affirmed.