FILED

10/26/2021

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 19-0675

DA 19-0675

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 277

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JESUS CHUEY VILLANUEVA,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 17-0740
Honorable Donald L. Harris, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Nancy G. Schwartz, N.G. Schwartz Law, PLLC, Billings, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, C. Mark Fowler, Assistant Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Billings, Montana

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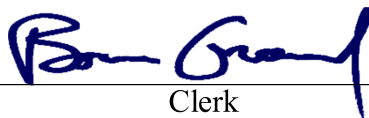
Submitted on Briefs: September 15, 2021

Decided: October 26, 2021

Filed:



Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Appellant Jesus Villanueva (Villanueva) was convicted by a jury in the Thirteenth Judicial District Court, Yellowstone County, of two counts of sexual assault against his minor stepdaughters, A.L. and C.L. On appeal, Villanueva alleges the District Court deprived him of his right to present a complete defense, and he requests the dismissal of his case or—alternatively—a new trial. Villanueva's appeal presents the following issues for review:

1. *Did the District Court err when it ruled that the State did not deliberately destroy potentially exculpatory evidence?*

2. *Did the District Court err when it prevented Villanueva from presenting evidence to the jury relating to the State's destruction of evidence?*

3. *Did the District Court abuse its discretion when it limited the scope of testimony by Villanueva's expert witness?*

¶2 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Villanueva lived in Billings, Montana with his wife, Autumn Villanueva (Autumn) and Autumn's four children—including Villanueva's twin stepdaughters, A.L. and C.L. Villanueva and Autumn were recovering methamphetamine addicts who met at a Narcotics Anonymous meeting. The couple married in April 2015. Towards the end of 2015, both Villanueva and Autumn relapsed. In February 2016, the Department of Public Health and Human Services, Child and Family Services Division (CFS), temporarily removed all four children from Villanueva and Autumn's care due to the couple's methamphetamine abuse. In June 2016, Heidi Kimmet (Kimmet)—a Child Protection Specialist (CPS) of

eighteen years—was assigned to the family's case by CFS. The record reflects that, between June 2016 and February 2017, Kimmet conducted interviews with Autumn, A.L., C.L., and Villanueva in connection with the family's then-ongoing CFS case.

¶4 In September 2016, after Villanueva and Autumn had both commenced a court-mandated drug treatment program, CFS returned the children to Villanueva and Autumn's care in Billings. Following the children's return, Autumn remained sober, and she eventually graduated from drug treatment court. However, Villanueva relapsed in October 2016. On January 31, 2017, Villanueva was arrested for driving under the influence (DUI) and was incarcerated. Over the course of the next few days, Villanueva made several recorded phone calls to Autumn from jail. During one of these phone calls, Autumn accused Villanueva of cheating on her the night he was arrested, to which Villanueva admitted. During another phone call, Autumn informed Villanueva that both of her then-seven-year-old twin daughters, A.L. and C.L., had come forward and told her that Villanueva had sexually assaulted them in the past. However, Villanueva denied these sexual assault accusations over the phone and pleaded with Autumn not to go to the police.

¶5 A few days later, on February 6, 2017, while Villanueva was still in jail for his DUI charge, Autumn arranged for an in-person meeting with CPS Kimmet. During this meeting, Autumn disclosed that, earlier that week, her twin daughters, A.L. and C.L., told her that Villanueva had sexually assaulted each of them on multiple occasions. Thereafter, Kimmet filed a report with the Yellowstone County Sheriff's Office. On February 14, 2017, the Sheriff's Office conducted separate forensic interviews with A.L. and C.L., each of whom reiterated their allegations against Villanueva. On July 5, 2017,

the State filed an Information charging Villanueva with two counts of sexual assault for acts allegedly committed against A.L. and C.L., in addition to one count of sexual intercourse without consent for acts allegedly committed against A.L. only.

Pre-trial Discovery

¶6 On July 6, 2017, Villanueva filed a discovery motion requesting that the State produce all materials pursuant to §§ 46-15-323, 46-15-327, MCA—the relevant statutory disclosure requirements for the State in criminal cases—as well as all other exculpatory material known to the State, pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). Discovery proceeded for over a year until November 20, 2018, when Kent Ewalt (Ewalt)—a private investigator hired by Villanueva—conducted an interview of CPS Kimmet in the presence of Villanueva's counsel. During this interview, Kimmet discussed the prior interviews she had conducted of A.L., C.L., Autumn, and Villanueva in connection with A.L. and C.L.'s CFS case. Each of Kimmet's CFS interviews with Villanueva's family members occurred after June 2016 but before February 2017—that is, before Kimmet was made aware of A.L. and C.L.'s sexual abuse allegations. As a result, Kimmet informed Ewalt and Villanueva's attorney that she had not questioned any family members about any potential sexual abuse allegations during these interviews. Kimmet also noted that she did not bring A.L. and C.L.'s CFS case file with her to the November 2018 interview with the defense. However, Kimmet disclosed that this case file included electronic notes from each of her interviews which she had entered into CFS's Child Adult Protection Systems (CAPS) database. Kimmet also stated that she had "possibly" kept her own handwritten notes from each of her interviews with these family

members and that these handwritten notes might also be present in A.L. and C.L.'s CFS case file. At the end of the interview, Villanueva's counsel informed Kimmet of the defense's desire to obtain copies of her handwritten notes.

¶7 On December 3, 2018, Villanueva submitted a motion for the production of all CFS documents related to A.L. and C.L. for an in-camera review. This motion requested CFS's "complete file" on the two children and specifically requested the production of both the electronic CAPS notes and the handwritten notes that Kimmet had mentioned during her November 2018 interview with the defense. The District Court approved the motion and the State subsequently provided its case file to the court for an in-camera inspection. On January 28, 2019, the District Court disclosed approximately 200 pages from the CFS file to both Villanueva and the State. Although Kimmet's CAPS notes were included in this disclosure, Kimmet's handwritten notes were not.

¶8 On January 30, 2019, Kimmet was interviewed a second time by Villanueva's private investigator, Ewalt, again in the presence of Villanueva's attorney. During this second interview, Kimmet disclosed that, although she had been able to locate some of her handwritten notes from her CFS interview with Villanueva, her previously referenced handwritten notes from her interviews with Autumn, A.L., and C.L. likely no longer existed. Kimmet recalled that, due to the confidentiality concerns surrounding CFS case information, Kimmet's supervisor, Roxanne Roller (Roller), had instructed Kimmet to enter the information from all of her handwritten interview notes into the secure CAPS database and to shred her handwritten notes thereafter. Kimmet stated that Roller had issued this directive on November 13, 2018—one week before Kimmet's first interview

with the defense—and that this directive applied to all of Kimmet's CFS cases. As a result, Kimmet informed Ewalt that she had previously spoken in error and had most likely shredded her handwritten notes after entering their content into CAPS, in compliance with her supervisor's request. Although Kimmet admitted that her CAPS reports are not always as detailed as her handwritten notes, she nevertheless stated her CAPS reports generally contain all "important" information from her handwritten notes. Furthermore, Kimmet reaffirmed that she did not discuss anything related to sexual abuse in her interviews with Autumn, A.L., and C.L. prior to February 2017, as CFS's investigation at this time was exclusively related to the child safety issues posed by Villanueva's and Autumn's drug use. Kimmet also asserted that, to the best of her knowledge, neither Autumn, nor A.L., nor C.L. had ever said anything during these interviews that would have caused Kimmet to suspect any sexual abuse of the children had occurred.

¶9 On February 26, 2019, Villanueva filed a motion to dismiss his criminal case on the grounds that, by failing to preserve and provide Villanueva with Kimmet's handwritten notes from her interviews with A.L., C.L., and Autumn, the State had violated Villanueva's due process right to "present a complete defense." Villanueva also filed a brief in support of this motion alleging the State had specifically violated his due process rights under *Brady* by failing to produce potentially exculpatory evidence. 373 U.S. at 87, 83 S. Ct. at 1196-97. Alternatively, Villanueva also argued that the State had "deliberately shredded" these exculpatory documents, constituting a due process violation due to the State's "failure to preserve evidence" under *California v. Trombetta*, 467 U.S. 479, 485-89, 104 S. Ct. 2528, 2532-34 (1984) (distinguishing the "failure to preserve" potentially

exculpatory evidence as a specific type of *Brady* due process violation, but imposing a separate two-prong legal test distinct from that of *Brady*). Villanueva also asserted violations of §§ 46-15-322(1)(e) and 46-15-327, MCA.[1] Overall, Villanueva's motion to dismiss asserted that Kimmet's handwritten notes from her CFS interviews with A.L., C.L., and Autumn would have revealed that A.L. and C.L. initially denied or were equivocal about whether Villanueva had ever sexually assaulted them.

¶10 On March 26, 2019, the District Court denied Villanueva's motion to dismiss. The District Court's order did not address whether Kimmet's shredding of these notes constituted a *Trombetta* due process violation—which occurs when the State unlawfully loses or destroys exculpatory evidence. 467 U.S. at 485-89, 104 S. Ct. at 2532-34. Instead, the District Court's order concluded that Villanueva's motion did not meet the legal standard for a disclosure violation under *Brady* for three reasons: (1) Kimmet never questioned the children about their sexual assault allegations during her interviews; (2) Kimmet entered all handwritten notes from these interviews into CAPS before shredding them, and these CAPS notes were provided to both parties; and (3) there was no reason to believe that the preservation of Kimmet's handwritten interview notes would affect the outcome of the proceedings.

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[1] These two Montana statutes codify disclosure requirements that are highly similar to *Brady*'s. Section 46-15-322(1)(e), MCA, requires the State to disclose to a defendant "all material or information that tends to mitigate or negate the defendant's guilt[.]" Additionally, § 46-15-327, MCA, clarifies that this duty to disclose is ongoing and requires the State to promptly disclose any additional information that is favorable to the defendant once it is discovered.

¶11 On April 10, 2019, Villanueva submitted a list of witnesses he intended to call, which included two witnesses from CFS—including Kimmet's Supervisor, Roller—whom Villanueva hoped to question at trial about the destruction of Kimmet's handwritten notes. On April 12, 2019, the State submitted a motion in limine to exclude evidence or argument at trial related to the destruction of the handwritten notes by CPS Kimmet. During its April 22, 2019 hearing on all parties' motions in limine, the District Court stated that, because Kimmet had already asserted she did not discuss anything related to sexual abuse in these interviews, there was "no reason for the [c]ourt to believe that the notes would have had any relevant information." The District Court granted the State's motion and prevented any testimony regarding the destruction of Kimmet's handwritten notes. Kimmet would eventually testify as a witness for the State during Villanueva's trial; however, in accordance with the court's order, she did not testify about her handwritten notes, nor was she cross-examined about this topic.

¶12 Prior to Villanueva's trial, the State also filed notice that it planned to have A.L. and C.L. testify. In response, Villanueva filed a motion for a pre-trial evidentiary hearing to determine the admissibility of A.L.'s and C.L.'s testimonies. Attached to Villanueva's motion was a 20-page report from a psychologist, Dr. Donna Veraldi (Dr. Veraldi), dated February 28, 2019 (February 2019 report), which called into question the credibility of A.L. and C.L's accusations. In the February 2019 report, Dr. Veraldi discussed potential factors that may taint the reliability of children's testimonies in sexual abuse cases, reviewed the transcripts from law enforcement's February 2017 forensic interviews with A.L. and C.L., and pointed out discrepancies in each child's statements during these

interviews. Dr. Veraldi's report also stated her professional opinion that Autumn had likely attempted to persuade A.L. and C.L. to admit that Villanueva had sexually abused them, potentially in retribution for Villanueva's recent confession to Autumn that he had cheated on her. Dr. Veraldi did not personally interview Autumn, A.L., or C.L. before issuing her report.

¶13 The District Court denied Villanueva's motion for an evidentiary hearing. Nevertheless, Villanueva also filed notice that he planned to call Dr. Veraldi as an expert witness at trial. Villanueva's notice expressed his intent to have Dr. Veraldi provide expert testimony "regarding circumstances which may lead to unreliable disclosures of sexual abuse by children, proper interviewing techniques, factors which affect the reliability of the statements made by the children in the instant case, and circumstances under which individuals may make false admissions." Villanueva sought to use Dr. Veraldi's expert testimony to bolster his theory of the case that A.L. and C.L's memories of events were unreliable and had likely been tainted by the suggestive questioning techniques used by their mother, Autumn, and potentially by law enforcement as well.

¶14 In response, the State filed a motion in limine asking the District Court to limit Dr. Veraldi's testimony to "facts which may adversely impact the accuracy" of children's disclosures and asked that Dr. Veraldi be expressly prohibited from commenting on the "believability" of the State's witnesses. At the April 22, 2019 motions in limine hearing, the District Court granted the State's motion and ordered that Dr. Veraldi could not testify about any of the statements offered by A.L., C.L., or Autumn. According to the

District Court, Dr. Veraldi's proposed expert testimony would amount to improper testimony attacking the "credibility" of these three witnesses; thus, under M. R. Evid. 702 (admission of "[t]estimony by experts"), Dr. Veraldi's testimony would interfere with the jury's role of independently weighing the credibility of A.L., C.L., and Autumn's testimonies. Specifically, the District Court referenced Dr. Veraldi's February 2019 report and noted that the report stated there was little scientific research to support any sort of methodology that would discriminate between when children's disclosures are reliable versus unreliable. The District Court further explained that, although Dr. Veraldi's report provided a list of indicia indicating when children might be lying to their parents and/or law enforcement about sexual abuse allegations, it did not also include a discussion of any equal and opposite indicia on how to identify when children are telling the truth. As a result, the court concluded that Dr. Veraldi's expert commentary on the credibility of the State's witnesses would be prejudicial and would likely "contaminate" the jury's ability to independently assess the credibility of A.L.'s, C.L.'s, and Autumn's testimonies.

¶15 Shortly thereafter, the District Court approved the State's motion in limine to call Dr. Wendy Dutton (Dr. Dutton)—an expert on forensic interviews—as a blind witness to educate the jury on the general trends associated with children's disclosures of sexual abuse allegations to law enforcement. However, the District Court also expressly stated that Dr. Dutton would be prohibited from commenting on any of the statements made by A.L. and C.L. or on their credibility. Following its decision to admit the testimony of Dr. Dutton, the District Court ultimately agreed to allow Dr. Veraldi to testify as an expert witness at trial, but only in "rebuttal" to Dr. Dutton's testimony. In doing so, the

District Court cabined the testimony of Dr. Veraldi in the same manner as Dr. Dutton's, thereby preventing Dr. Veraldi from commenting on the specific facts of Villanueva's case.

Testimony at Trial

¶16 Villanueva's jury trial was held on April 23 through 26, 2019. Both A.L. and C.L. testified. C.L. testified that, on multiple occasions, Villanueva would touch her, both outside and inside her clothes, on "[her] personal parts" that she ordinarily "covers with a . . . swimsuit." C.L.'s testimony was detailed and noted that these alleged instances of sexual abuse "usually [occurred] in the morning" at their home while C.L. was still wearing a nightgown or pajamas. C.L. also testified that, on at least one occasion, she was forced to touch Villanueva's penis with her hand.

¶17 During A.L.'s testimony, she stated that, on "more than on[e]" occasion at their home, Villanueva had reached underneath her pajamas and touched her vagina with his hand. A.L. also testified that, on a separate occasion, while she was in the car with Villanueva, Villanueva had put his penis in her mouth, which "made [her] upset."

¶18 Autumn also testified at trial. Autumn stated that, in February 2017, while she was bathing A.L., she directly asked A.L. whether Villanueva had ever "touched [A.L.'s] private parts." According to Autumn's testimony, A.L. replied that "he told me not to tell anybody because he would go to jail. But I think since he's in jail now, I can go ahead and tell you now that whenever we would lay down together, he would touch me on my private parts." Shortly after speaking with A.L., Autumn testified that she asked C.L. this same question and that C.L. "looked down and nodded" in reply.

¶19 Villanueva did not testify at trial. However, the jury was played a recording of an earlier interview between Villanueva and law enforcement. In this recorded interview, Villanueva denied the charges and stated that, during the period at which A.L. and C.L.'s accusations allegedly occurred, he and his wife, Autumn, were routinely high on methamphetamine. In the recording, Villanueva also claimed that Autumn would get obsessive and paranoid while she was high, which mistakenly caused her to get "this notion in her head that [Villanueva] was messing with the girls." In his recorded statements, Villanueva said that his and Autumn's "brains were messed up" because of their drug use and that he believed Autumn fabricated these allegations as a result. Villanueva asserted that Autumn would often confront him about these allegations while she was high, and that the two would frequently fight about this topic "for days," with Villanueva denying Autumn's accusations of sexual abuse. Villanueva alleged that, due to his wife's "obsessive" temperament while high, she could not get off the topic and eventually tainted the girls' memories by "putting this in our girls' heads" and "making them think that that happened."

¶20 Both the State and Villanueva had an expert witness testify at trial. The State called Dr. Dutton, an expert on forensic interviews, as a blind expert. Dr. Dutton testified about the typical patterns exhibited by children when they disclose allegations of sexual abuse to law enforcement. Dr. Dutton's testimony also noted that the timing of sexual abuse disclosures by children has no real bearing on the veracity of these disclosures. The jury also heard from Villanueva's expert witness, Dr. Veraldi, who discussed several general topics, including childhood memory formation and recollection, childhood amnesia, the

role that an interviewer's bias might have on a child's disclosure of sexual abuse, the suggestibility of a child by a parent's emotional tone during questioning by that parent, children's tendencies to misattribute the sources of their memories, and the inability of forensic interviewers to correct a child's memory once it has already been tainted by an outside source. In accordance with the District Court's prior instructions, neither Dr. Dutton nor Dr. Veraldi testified regarding the specific facts of Villanueva's case or commented on the credibility of—or on the statements made by—A.L., C.L., and Autumn.

Defendant's Conviction and Appeal

¶21 The jury acquitted Villanueva of sexual intercourse without consent but convicted him of two counts of felony sexual assault. The District Court imposed two concurrent sentences of 40 years, with a 20-year parole restriction.

¶22 On appeal, Villanueva argues the State acted in bad faith when it destroyed CPS Kimmet's handwritten notes, denying him his due process right to present a complete defense. Villanueva also argues that he was denied the right to present a complete defense when the District Court prevented him from eliciting testimony about the destruction of the handwritten notes. Lastly, Villanueva argues that the District Court abused its discretion when it limited the testimony of his expert witness.

STANDARDS OF REVIEW

¶23 This Court reviews the denial of a motion to dismiss in a criminal case de novo to determine whether the district court's conclusions of law are correct. *State v. Seiffert*, 2010 MT 169, ¶ 10, 357 Mont. 188, 237 P.3d 669 (citations omitted). Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, a criminal

defendant must be given "a meaningful opportunity to present a complete defense," which imposes a duty upon the State to preserve and provide exculpatory evidence to criminal defendants. *Trombetta*, 467 U.S. at 485, 104 S. Ct. at 2532. This Court's review of constitutional questions, including alleged due process violations, is plenary. *State v. Ilk*, 2018 MT 186, ¶ 15, 392 Mont. 201, 422 P.3d 1219 (citing *State v. Jackson*, 2009 MT 427, ¶ 50, 354 Mont. 63, 221 P.3d 1213 (citations omitted)).

¶24 The authority to grant or deny a motion in limine rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties; thus, we will not overturn a district court's grant or denial of a motion in limine absent an abuse of discretion. *State v. Dubray*, 2003 MT 255, ¶ 47, 317 Mont. 377, 77 P.3d 247 (citations omitted). A district court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *State v. Weber*, 2019 MT 216, ¶ 8, 397 Mont. 239, 448 P. 3d 1091 (citations omitted). Furthermore, a district court is vested with broad discretion in ruling on the admissibility of expert testimony and, without a showing of abuse of discretion, the district court's ruling will not be disturbed on appeal. *State v. Riggs*, 2005 MT 124, ¶ 18, 327 Mont. 196, 113 P.3d 281 (citations omitted).

¶25 *1. Did the District Court err when it ruled the State did not deliberately destroy potentially exculpatory evidence?*

¶26 In *Brady*, the United States Supreme Court held that the State's "suppression . . . of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of

the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196-97. *See also State v. Jeffries*, 2018 MT 17, ¶¶ 15-16, 390 Mont. 189, 410 P.3d 972 (discussing *Brady*'s holding). In *Brady*'s wake, two additional United States Supreme Court cases have helped develop a specific test for when the government's loss or destruction of potentially exculpatory evidence rises to the level of a constitutional due process violation under *Brady*: *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528 (1984), and *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1988).

¶27 In *Trombetta*, the Supreme Court reasserted that the State has a constitutional duty under *Brady* to preserve potentially exculpatory evidence; however, *Trombetta* also cautioned that, whenever potentially exculpatory evidence is permanently lost or destroyed by the State, "courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." 467 U.S. at 486, 104 S. Ct. at 2533. The *Trombetta* Court articulated a two-prong test for when the State's failure to preserve evidence meets the level of "constitutional materiality" necessary to constitute a *Brady* due process violation: (1) the evidence at issue must "possess an exculpatory value that was apparent before the evidence" was permanently lost or destroyed, and (2) the evidence must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489, 104 S. Ct. at 2534 (citing *United States v. Agurs*, 427 U.S. 97, 109-10, 96 S. Ct. 2392, 2400 (1976).

¶28 Next, in *Youngblood*, the Supreme Court modified the first prong of *Trombetta*'s test by holding that if the "exculpatory value" of unpreserved evidence is indeterminate, then a criminal defendant must show "bad faith on the part of [the State]" in its failure to

preserve the evidence; otherwise, in the absence of bad faith, the State's "failure to preserve *potentially* useful evidence does not constitute a denial of due process" under *Trombetta*'s standard. *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337 (emphasis added). In *State v. Giddings*, we restated *Youngblood*'s relevant standard for the state of Montana: whenever lost or destroyed evidence is (1) "only potentially exculpatory, rather than apparently exculpatory," the defendant (2) "must show bad faith by the State in order to establish a due process violation." 2009 MT 61, ¶ 48, 349 Mont. 347, 208 P.3d 363 (citing *Youngblood*, 488 U.S. at 57-58, 109 S. Ct. at 337).

¶29 On appeal, Villanueva's sole argument on this issue is that Kimmet's shredding of her handwritten notes constitutes a "bad faith" destruction of evidence by the State. Specifically, under *Gidding*'s articulation of *Youngblood's* standard, Villanueva argues Kimmet destroyed (1) potentially exculpatory evidence in (2) bad faith. *Giddings*, ¶ 48. On this first prong, Villanueva concedes that the content of CPS Kimmet's notes prior to their destruction was not "apparently exculpatory," but he then argues that it was nevertheless "potentially exculpatory." In support of this contention, Villanueva contests Kimmet's assertion that her CFS interviews with A.L., C.L., and Autumn did not involve any discussion of sexual assault, arguing that "the idea that an experienced social worker would place young girls back into the home with [Villanueva,] a registered sexual offender[,] without questioning them about the possibility of 'inappropriate touching' is unrealistic."[2] Villanueva further claims that "[i]f the notes had contained evidence that

[2] The record reflects that, as of the commencement of this case, Villanueva was already a registered sex offender due to a separate and unrelated conviction from 1993.

Autumn . . . had previously talked to [Kimmet] about Autumn's paranoia and her concerns of sexual abuse, this would have corroborated Villanueva's theory of defense" that Autumn's paranoia implanted false memories within A.L. and C.L. However, even accepting that Kimmet's handwritten notes may have been "potentially exculpatory," Villanueva's argument ultimately fails, as he is unable to show Kimmet acted in bad faith.

¶30 Our case law does not provide much guidance regarding successful allegations of "bad faith" conduct in the context of destroying potentially exculpatory evidence. Nevertheless, Villanueva asserts that, in federal cases that have found bad faith conduct in this context, a common factor is that the defendant made a specific request for the evidence before it was destroyed. *See, e.g.*, *United States v. Bohl*, 25 F.3d 904, 911 (10th Cir. 1994). Villanueva alleges that this "specific request" occurred towards the end of Kimmet's interview with the defense on November 20, 2018, when Villanueva's counsel informed Kimmet that Villanueva would like to obtain copies of her handwritten notes. Villanueva then alleges that Kimmet purposefully destroyed her notes after this request because she believed they contained information that might cast doubt on Villanueva's sexual abuse charges.

¶31 The record reflects it is highly likely Kimmett shredded her interview notes the week before Villanueva's counsel informed her of Villanueva's request for these notes. There is no evidence indicating that Kimmet acted with any intent to purposefully harm Villanueva's defense; instead, as a CFS employee, Kimmet was merely acting in accordance with CFS's policy of ensuring that information surrounding abuse and neglect cases is kept confidential. During her November 20, 2018 interview with Ewalt and

Villanueva's counsel, when Kimmet was asked whether her handwritten notes would be available, Kimmet replied "[p]ossibly" and went on to state that "[s]ometimes, when [she] [ ] takes notes, [she] will add that information into [the CAPS] system . . . and then shred [her] handwritten notes." On January 30, 2019, during Kimmet's second interview with Ewalt and Villanueva's counsel, Kimmet recalled that on November 13, 2020—one week before her initial interview with the defense—she had received a specific directive from her supervisor asking her to enter all handwritten notes into CAPS and to then shred the physical notes for confidentiality purposes. Villanueva provides no compelling reason to doubt Kimmet's stated version of events. Thus, Kimmet's testimony, with no evidence to the contrary, supports the conclusion that the State did not act in bad faith when Kimmet destroyed her handwritten notes.

¶32 Moreover, even in the absence of bad faith, the negligent loss or destruction of Kimmet's handwritten notes would still not constitute a due process violation under *Trombetta*'s standard. *Trombetta*'s test expressly notes that, when the State destroys allegedly exculpatory evidence, no due process violation occurs unless that evidence is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489, 104 S. Ct. at 2534. Here, Villanueva was still clearly able to obtain "comparable evidence" in the form of the CAPS reports from Kimmet that were provided to the defense. Kimmet stated she only shreds her handwritten notes from interviews with children and their families after she has entered all "important" information from these handwritten notes into the CAPS system. During discovery, Villanueva was provided the CAPS reports from Kimmet's interviews, and Villanueva's

argument that the contents of Kimmet's handwritten notes was substantively different from that of her CAPS reports amounts to little more than speculation. Due to the existence of these CAPS notes, Kimmet's handwritten notes do not constitute evidence "material" to proving Villanueva's guilt or innocence, as is required for *Trombetta* and *Brady*'s preservation and disclosure requirements to apply.[3] *Trombetta*, 467 U.S. at 480-81, 104 S. Ct. at 2529-30 (citing *Brady*'s general holding). Thus, we affirm the District Court's holding that the State's failure to preserve and provide these notes did not violate Villanueva's constitutional right to due process.

¶33 *2. Did the District Court err when it prevented Villanueva from presenting evidence to the jury relating to the State's destruction of evidence?*

¶34 Villanueva contends the District Court abused its discretion when it prevented Villanueva from presenting evidence or arguments at trial related to the shredding of CPS Kimmet's handwritten notes. Villanueva once again claims that this decision violated his constitutional due process right to present a "complete defense," as it prevented him from calling witnesses to discuss the destruction of Kimmet's notes. Villanueva also contends that, by preventing him from cross-examining Kimmet about her handwritten notes during her trial testimony, he was denied his constitutional right to confront the witnesses offered against him. *See* U.S. Const. amend. VI; Mont. Const. art. II, § 24. However, Villanueva fails to provide any further explanation regarding these alleged violations, nor does he cite

[3] Our conclusion, under *Trombetta*'s standard, that no *Brady* violation occurred makes it unnecessary to address the State's contention that, under § 46-15-322(4), MCA, the State's duty to preserve and produce evidence should not extend to Kimmet's handwritten notes because Kimmet, as a CFS employee, was not a member of the prosecution team.

any authoritative case law in support of these two contentions. As we have previously noted, under M. R. App. P. 12(1), this Court is not obligated to develop arguments on behalf of an appellant who fails to do so. *See State v. Whalen*, 2013 MT 26, ¶ 35, 368 Mont. 354, 295 P.3d 1055. Additionally, these arguments are premised upon the importance of Kimmet's handwritten notes to Villanueva's defense—a premise we have rejected because comparable evidence was provided to the defense in the form of Kimmet's CAPS reports. As a result, both of these arguments fail, and the District Court did not err when it granted the State's motion in limine to prevent evidence or arguments at trial related to the destruction of Kimmet's notes.

¶35 *3. Did the District Court abuse its discretion when it limited the scope of testimony by Villanueva's expert witness?*

¶36 Villanueva's third argument contends that the District Court abused its discretion when it restricted the scope of testimony provided by Villanueva's expert witness, Dr. Veraldi. At the parties' April 2019 motions in limine hearing, the District Court granted a motion in limine by the State and prevented Villanueva's expert witness, Dr. Veraldi, from testifying about any of the statements of three State witnesses—A.L., C.L., and Autumn. In doing so, the District Court noted that credibility determinations must be left to the jury and that admitting such testimony from Dr. Veraldi would be unduly prejudicial. Later at the hearing, the District Court agreed to permit the State's expert witness, Dr. Dutton, to testify regarding the general patterns observed by law enforcement when children disclose sexual abuse. However, Dr. Dutton testified as a "blind witness" and on the condition that she would not discuss any of the specific facts of Villanueva's case.

Thereafter, the District Court stated it would also permit Dr. Veraldi to testify as an expert. However, the District Court limited Dr. Veraldi's testimony in the same manner as the State's blind expert, preventing Dr. Veraldi from commenting on the specific facts of Villanueva's case. This limitation is likewise consistent with the District Court's earlier limitation on Dr. Veraldi's testimony, which prevented her from commenting on the specific statements of A.L., C.L., and Autumn. By restricting Dr. Veraldi's testimony in this manner, Villanueva asserts the District Court violated his constitutional due process right to "present a complete defense," as articulated in *State v. Reams*, 2020 MT 326, ¶ 18, 402 Mont. 366, 477 P.3d 1118.

¶37 On numerous occasions, this Court has stated that it is the sole duty of a jury to determine the credibility of witnesses. *See, e.g.*, *Reams*, ¶ 11. Thus, an expert witness is ordinarily barred from commenting on the credibility of an alleged victim. *State v. Robins*, 2013 MT 71, ¶ 11, 369 Mont. 291, 297 P.3d 1213. However, in *State v. Scheffelman*, 250 Mont. 334, 820 P.2d 1293 (1991) and its progeny, the Court established a narrow exception to this rule—often dubbed the "*Scheffelman* exception"—which allows an expert to comment directly on a victim's credibility in child sexual abuse cases, provided that all of the following conditions are met: (1) the alleged victim is a "very young" child at the time of trial, (2) the victim testifies at trial, (3) the victim "exhibits contradictory behavior," and (4) the expert is "properly qualified" to comment. *Rogers v. State*, 2011 MT 105, ¶ 26, 360 Mont. 334, 253 P.3d 889; *State v. Hensley*, 250 Mont. 478, 481-82, 821 P.2d 1029, 1031-32 (1991); *Scheffelman*, 250 Mont. at 342, 820 P.2d at 1298. However, the *Scheffelman* exception is only implicated when an expert seeks to "directly comment[] on

the victim's credibility." *Reams*, ¶ 11 (quoting *Robins*, ¶ 12). On the other hand, "[e]xpert testimony that only indirectly bears on a child sexual abuse victim's credibility does not have to satisfy the *Scheffelman* exception's requirements to be admissible"; in these instances, we need only consider whether the expert's testimony was proper under Mont. R. Evid. 702. *Reams*, ¶¶ 11-12. *See also Robins*, ¶¶ 12-13.

¶38 Here, Villanueva does not argue that the full scope of Dr. Veraldi's proposed testimony deserved to be admitted under the *Scheffelman* exception. Instead, Villanueva's appeal argues only that, under *Reams*, Dr. Veraldi should have been "allowed to apply her expertise to the facts of [Villanueva's] case" because Dr. Veraldi's testimony only "indirectly bear[s]" on the credibility of the sexual abuse victims in this case, A.L. and C.L. *Reams*, ¶ 11. In support of this contention, Villanueva argues that "Dr. Veraldi was not going to be asked to comment on the credibility of the children, but rather . . . the [suggestive questioning] process used to elicit their disclosures by Autumn" and to provide her "expert opinion on whether this process may have resulted in [] unreliable statement[s]" by the children. As a result, Villanueva proposes that *Reams*'s exception for expert testimony that only "indirectly" comments on a victim's credibility should apply.

¶39 However, we find Villanueva's argument unconvincing for multiple reasons. First, Villanueva's reliance on *Reams* to support his contention that Dr. Veraldi should have been "allowed to apply her expertise to the facts of this case" is misplaced, as the expert in *Reams* was not permitted to comment on any of the specific facts of that case. *Reams*, ¶¶ 6, 16. Rather, in *Reams*, we permitted an expert witness to testify when that expert sought only to "present educational testimony" concerning "general causes of false reports [of]

child sexual abuse[.]" *Reams*, ¶ 16. The "general" matters of testimony permitted in *Reams* included generic testimony regarding the occasional "intentional deception" of victims and "distortion of [a victim's] memor[ies]/belief[s]." *Reams*, ¶ 6. In Villanueva's case, the record demonstrates that Dr. Veraldi was already permitted to testify, and did testify, on a variety of "general" matters pertaining to child sexual assault, including child memory formation/recollection and the role that an interviewer's bias may have on a child's disclosure—the same types of "general" matters that this Court admitted in *Reams*. However, Villanueva's assertion that the lower court should have also allowed Dr. Veraldi to directly comment on the facts of Villanueva's case—especially when this testimony would aim to prove that A.L. and C.L. made "unreliable statement[s]"—goes well beyond the scope of admissible testimony contemplated by *Reams*. Instead, this Court noted in *Reams* that "it would be appropriate for the District Court to limit [an expert's] testimony to [ ] general issues and restrict her from commenting directly on [a victim's] credibility." *Reams*, ¶ 16. Additionally, neither of the two cases that this Court relied upon in *Reams* support Villanueva's contention that *Reams*'s exception applies to situations where expert witnesses seek to comment on the specific facts of a case. *See Robins*, ¶ 7 (expert testified solely about general processes in child sexual abuse cases and "did not discuss the specifics of [defendant's] case and did not offer an opinion on whether [the victim] had been abused"); *State v. Morgan*, 1998 MT 268, ¶ 26, 291 Mont. 347, 968 P.2d 1120 (allowing an expert's testimony when the expert "did not investigate [the victim's] case and offered no opinion concerning the credibility of [the victim] or any other specific aspect of the case").

¶40 Second, unlike the general, non-specific testimonies from the experts in *Reams*, *Robins*, and *Morgan*, the additional testimony from Dr. Veraldi that Villanueva seeks to include does not "indirectly bear" on the credibility of the alleged victims in this case. Instead, Dr. Veraldi testifying that, in her expert opinion, Autumn's process of questioning A.L. and C.L. likely led to "unreliable statement[s]" from the children amounts to the type of "direct commentary" on the children's credibility that Montana law prohibits. *See State v. Harris*, 247 Mont. 405, 409-10, 808 P.2d 453, 455 (1991). The record—including the psychological report by written by Dr. Veraldi—confirms that Villanueva's request to allow Dr. Veraldi to provide additional opinion testimony on the facts of this case has a singular purpose: to allow Villanueva's expert to provide discrediting opinion testimony that would call into question the credibility of A.L.'s and C.L's testimonies. Indeed, Villanueva's appeal confirms that this additional testimony from Dr. Veraldi would discredit A.L. and C.L. because it would allege they made "unreliable statements" to Autumn and to law enforcement—precisely the type of "direct" expert commentary on the reliability of victims' allegations that is prohibited by *Reams* and the case law that preceded it. *Reams*, ¶ 11; *Robins*, ¶ 12; *Morgan*, ¶¶ 35, 40.

¶41 Because Dr. Veraldi's proposed additional testimony would indeed "directly comment" on the credibility of A.L. and C.L.'s allegations of sexual assault, *Reams*'s exception for admitting this testimony is inapplicable. *See Reams*, ¶ 11 (citing *Robins*, ¶ 12). Instead, the proper standard for admitting Dr. Veraldi's additional testimony is articulated under the *Scheffelman* exception's four-part test. However, in making its argument under *Reams*, Villanueva's appeal expressly conceded that the *Scheffelman*

exception was inapplicable in this case. As a result, we need not further analyze the admissibility of Dr. Veraldi's additional testimony under the *Scheffelman* exception. The District Court's decision to prevent Dr. Veraldi from commenting on the specific facts of Villanueva's case is wholly consistent with Montana's longstanding rule that expert witnesses may not comment on the credibility of alleged victims. *See Robins*, ¶ 11; *Harris*, 247 Mont. at 409, 808 P.2d at 455. Indeed, allowing Dr. Veraldi to testify to her professional opinion that A.L. and C.L. were lying due to Autumn's influence/suggestive questioning techniques would have undoubtedly infringed upon the jury's duty to independently weigh the credibility of A.L.'s and C.L.'s testimonies. *See Harris*, 247 Mont. at 409, 808 P.3d at 455 ("The question of the credibility of an alleged victim lies exclusively within the province of the jury. Expert testimony regarding credibility improperly invades the jury's function by placing a stamp of scientific legitimacy on the victim's allegations."). Thus, Villanueva's argument fails, and we hereby conclude that the District Court did not abuse its discretion by restricting the content of Dr. Veraldi's testimony.

CONCLUSION

¶42 We conclude that the District Court did not err in denying Villanueva's motion to dismiss, as Villanueva has failed to show on appeal that the State destroyed Kimmet's handwritten notes in bad faith.

¶43 Furthermore, we deny Villanueva's request for a new trial on two grounds. First, the District Court did not abuse its discretion when it granted the State's motion in limine preventing further arguments and evidence to the jury related to the alleged destruction of

Kimmet's notes. Second, that the District Court did not abuse its discretion when it restricted the permissible scope of Dr. Veraldi's expert testimony.

¶44 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE