NO. COA09-1426

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v. Wilkes County
No. 07 CRS 053968
07 CRS 053969

PAUL DOUGLAS ABSHER JR.
and GEORGIA LOGAN MINTON,

Defendants.

Appeal by the State from order entered 3 September 2009 by Judge Carl R. Fox in Wilkes County Superior Court. Heard in the Court of Appeals 29 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Morrow, Alexander, & Porter PLLC, by John C. Vermitsky, for defendants.

ELMORE, Judge.

The State appeals from an order dismissing, with prejudice, charges of assault on a government official and resisting a public officer against Paul Douglas Absher, Jr. (defendant Absher), and the charge of resisting a public officer against Georgia L. Minton (defendant Minton). We affirm.

Background

The following facts are undisputed: On the night of 19-20 September 2007, defendant Absher was involved in an altercation with the Wilkes County Sheriff's Department (Sheriff's Department) and the Wilkesboro Police Department (Police Department). As a result of this altercation, defendant Absher "allegedly suffered serious injuries including a fractured skull, lacerations, a serious brain injury and bleeding on the brain, a collapsed lung[,] and other life threatening injuries." For his part in the altercation, defendant was charged with assault on a government official and resisting and delaying an officer in the performance of his duties. Both defendants were tried for these offenses in district court, and defendant Absher was found guilty of both; defendant Minton was found guilty only of resisting and delaying an officer. Defendants appealed their convictions to the Superior Court Division of Wilkes County for a trial *de novo*.

Before trial, defense counsel filed a motion to dismiss the charges based on loss and destruction of exculpatory evidence by the State. According to the motion, when defendant Absher was arrested, he was brought to the intake center and then was shackled to a chair and assaulted by law enforcement officers. The intake center's closed circuit television video feed recorded all of these events. On 1 October 2007, defense counsel sent letters to the Sheriff's Department and the Wilkes County District Attorney's Office. Those letters stated, in relevant part:

> It is my understanding that your office is in possession of several videotapes and unfinished reports regarding the incident that led to my client's injuries on 9/20/07.

> It is my understanding that among these reports and videos is a videotape of my client which was taken while he was detained by the Wilkes County Sheriff's office for a period of about 30-40 minutes prior to his admission to Wilkes General Hospital.
>
> This letter represents the formal request and demand of our office that said materials be made available for inspection at a mutually convenient time and location. In the alternative, should your office not wish to cooperate with this request, please take this letter as our office's formal demand that all such materials be preserved and not taped over, destroyed, or altered in any way. Please confirm the receipt of this letter no later than Friday October 5, 2007.

Defense counsel followed these letters with a request for voluntary disclosure and written request for *Brady* material. Specifically, defendant sought the State's permission to allow his attorney to "inspect and copy . . . motion pictures . . . which are within the possession, custody, or control of the State, . . . [s]pecifically including but not limited to, all videos of the defendant at the time he was being held by the Wilkes County Sheriff's office in a holding cell prior to hospitalization." (Emphasis removed.)

On 9 October 2007, an assistant district attorney responded to defense counsel's letter and request. In his letter, he stated that "[t]he rules of pre-trial discovery in criminal cases only apply to cases within the original jurisdiction of the Superior Court . . . . There are no rules requiring pre-trial discovery for cases within the original jurisdiction of the District Court, such as [defendant's] case." He further explained, "Our office does not

generally maintain files or other evidence for offenses charged as misdemeanors."

On 23 October 27, defense counsel sent a subpoena to the Sheriff's Department requesting "[a]ll Sheriff Department reports, video's [*sic*] of the Defendant, Paul Absher, Jr., and any other documents related to the arrest and injuries that Mr. Absher sustained on September 20, 2007." In response, the Sheriff's Department produced reports by two deputies. On 25 July 2008, defendant sent another subpoena to the Sheriff's Department asking it to "forward to [his attorney] any and all video recordings from the intake of the jail facility pertaining to the incident of September 19, 2007, which formed the basis of [defendant's charges.]" On 15 August 2008, defense counsel sent an identical subpoena to the Wilkes County Emergency Management Department (Emergency Management Department).

According to the motion to dismiss, Suzanne Hamby from the Emergency Management Department responded to the subpoena by calling defense counsel. During this phone call, defense counsel learned that the original video had been destroyed, a "new video" had been created, and the "new video" was in the possession of the Sheriff's Department. The motion to dismiss described the creation of the new video as follows:

> [T]he Wilkes County Sheriff's Department took affirmative steps to ensure that the video in its original form was erased and modified into a "new video" which consisted of a series of photographs which were put together into a type of "flipbook" of what occurred on that evening. After selectively choosing what images to include in this "new video" the

> Sheriff's Department ordered the old video to be destroyed and took possession of the new video.

When the case was called to trial on 27 July 2009, the court first addressed the motion to dismiss in a pretrial hearing, which it granted after hearing both sides' arguments and the testimony of six State's witnesses. The trial court entered its order dismissing both defendants' charges on 3 August 2009. The State now appeals.

ARGUMENTS

We note at the outset that the State directs all of its arguments toward defendant Absher, rather than both defendants. However, both defendants have appealed. Because the State addresses defendant Absher in its arguments and defendants' brief responds in kind, we also primarily address the arguments as they apply to defendant Absher. We address defendant Minter's appeal in section III below.

I. Motion to Dismiss.

The State first argues that the trial court erred by dismissing the prosecution against defendants because the trial court's findings of fact and conclusions of law were unsupported and erroneous. The trial court's order contained thirty-nine findings of fact and seven conclusions of law, most of which the State now challenges on appeal. Specifically, the State challenges findings of fact 3, 6, 7, 8, 13, 14, 15, 17, 18, 21, 24, 26, 27,

28, 29, 35, 36, 37, 38, and 39 and conclusions of law 4, 5, 6, and 7.

General Statute section 15A-954(a)(4) governs a criminal defendant's motion to dismiss if he alleges that his "constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2009). If, on the defendant's motion, a trial court makes a determination that such a violation has occurred, it must dismiss the charges against the defendant. *Id.*

> In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. Even if evidence is conflicting, the trial judge is in the best position to resolve the conflict. The decision that defendant has met the statutory requirements of N.C.G.S. § 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Williams, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotations and citations omitted).

A. Findings of Fact

1. Finding of fact 3. We begin our analysis with finding of fact 3. The finding states:

> The intake facility was subject to video surveillance by way of a DVR system maintained by the Wilkes County Government by and through the Wilkes County Sheriff's department in conjunction with the Wilkes County Emergency Management Department. This DVR was located in both the Wilkes County Courthouse as well as in the office of Suzanne Hamby, the Director of the Emergency Management Department of Wilkes County.

The State argues that there was no evidence that the video system was "maintained" by the Sheriff's Department; the State alleges that the system was owned by the county and maintained by the Emergency Management Department. We disagree.

In her deposition, Hamby testified that the videos at the intake facility recorded simultaneously to two DVRs — one located in the intake facility and the second located in Hamby's office. She explained that this back-up recording took place in her office because the U.S. Department of Homeland Security had provided money to the Emergency Management Department to upgrade cameras in various locations around the county. She explained that after the Emergency Management Department "got the money with the Homeland Security, we just — we — they needed a backup place, and that's just where it was put was in my office because we got the grant money to do it, and that's all I know." When asked, she confirmed that "[s]upervising the intake facility and the sheriff's department is not part of [her] responsibility of [her] department." When asked who was "directed and tasked with supervising that intake facility recording," she responded, "I would say the sheriff's — it's under the sheriff." Accordingly, we hold that finding of fact 3 is supported by competent evidence.

2. Findings of fact 6 and 7. The State next challenges findings of fact 6 and 7, which state:

> 6. According to the testimony of James Brian Griffith, the third party security vendor who installed and maintains the security system, this system was installed on the computers of several Wilkes County Sheriff's deputies and could be accessed by any individual with the Wilkes County Sheriff's Department via any county computer if the individual had both a password and IP (Internet Protocol) address which was provided by Mr. Griffith.
>
> 7. The installation of this password and IP address could be completed by Mr. Griffith in less than 5 minutes.

The State argues that findings of fact 6 and 7 are not supported by competent evidence because there was no evidence that "any more than one deputy had on his computer access to the video feed." We disagree.

During the hearing, Griffith testified that Hamby's "backup system" was not a true back-up system, but instead Hamby had "the IP addresses and the program downloaded on her computer, which will allow her, through the internet or through the county network, to access and to connect to the digital video records over here in the Breathalyzer room." Griffith explained that "anywhere in the county, with the proper software, you can reach and read and do every function that the recorder is capable of." When asked if Hamby's office was the only office with that capability, Griffith replied:

> Well, originally, whenever I installed it, I installed it in Mr. Huffman's office and a deputy that was across from him, and I showed them how to operate the system. And from that point, the software was disseminated further,

> and there was a couple other deputies that got a hold of it. I know they downloaded it on their computers.
>
> Suzanne wanted it on her computer so in case there was ever, you know, something like a hostage situation or something like that, that she would have the capability and access to it to — to use at her disposal.

When asked how long it would take to install the software necessary to connect to the digital video records, Griffith responded, "Three minutes or less." Accordingly, we hold that findings of fact 6 and 7 are supported by competent evidence.

3. Finding of fact 8. The State next challenges finding of fact 8, which states:

> On October 1, 2007, while this video was still in its original form and unmodified, counsel for the Defendants sent a letter to the Wilkes County Sheriff's Department as well as the Wilkes County District Attorney's Office asking both agencies to preserve all video images of the intake center and incident in question and specifically requesting that these images not be taped over, destroyed or altered in any way due to their exculpatory value.

The State argues that neither letter made any mention of the exculpatory value of the alleged evidence. We acknowledge that neither letter used the phrase "exculpatory value," but defense counsel's meaning was plain when he wrote that the requested video related to the incident "which led to [his] client's injuries," that the video showed defendant Absher, and that the video "was taken while [defendant Absher] was detained . . . for a period of about 30-40 minutes prior to his admission to Wilkes General

Hospital." Accordingly, we hold that finding of fact 8 was supported by competent evidence.

4. Findings of fact 13, 14, and 15. The State next challenges findings of fact 13, 14, and 15, which state:

> 13. Despite the letter to the Sheriff, Chief Deputy Chris Shue[1] made no mention to Ms. Hamby of the need to preserve the video in its original form or the letter received from this office and instead agreed to have a third party agent (Mr. James Brian Griffith) review the video and use it to create a new video that only maintained what Mr. Griffith determined in his sole discretion to be the "points of contact" between the Defendant and members of the Wilkes County Sheriff's Office.
>
> 14. At Chief Deputy Shue's direction and with his consent, Ms. Hamby called Mr. James Brian Griffith, owner of Griffith Security. Mr. Griffith looked at the video and determined that it contained between 7 and 9 gigabytes of information. Mr. Griffith talked with Suzanne Hamby and together along with Chief Deputy Shue they determined that it would be appropriate to modify the video to only preserve the portions where the officers were in physical contact with the Defendant Absher.
>
> 15. At Ms. Hamby and Chief Deputy Shue's direction, Mr. Griffith then created a new video. Mr. Griffith created a new video using this method, removing all of the images where Mr. Absher was purportedly in a room alone or where Mr. Griffith determined in his own discretion that there was no "physical contact" between Mr. Absher and the deputies involved. In doing this, Mr. Griffith admittedly failed to download scenes where Mr. Absher was visible on camera in a room alone for some extended period of time and at least 2 minutes and 34 seconds where Mr. Absher was in a room with 2-3 deputies and two paramedics.

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[1] The order misspells Chief Deputy Shew's name throughout. For ease of reading, we have not indicated each mistake.

The State argues that no evidence was presented that only "points of contact" were saved at the direction of Chief Deputy Chris Shew. We disagree. During her deposition, Hamby testified that she first learned of the video in question when Chief Deputy Shew called her and asked to view the video of a particular day and time, which corresponded to the time that defendant Absher was in custody. Chief Deputy Shew watched the video, but he did not ask her to do anything further with the video. When Hamby was eventually asked to copy the video, she and Griffith did not copy the entire video; instead, they only copied the frames that showed "somebody had their hands on" defendant Absher. She confirmed that Griffith "changed the video from it's [*sic*] original form to the form where it only had hands-on contact points per his discretion."

However, Hamby's testimony was inconsistent as to whether the Sheriff's Department asked Hamby and Griffith to edit the video. During her deposition, she testified that Griffith decided to edit the video because the full video would have "crashed the system." During that exchange, she stated that she did not communicate that decision with the Sheriff's Department, but also that the Sheriff's Department had never informed her that it needed the entire video. Later during the deposition, she testified that "Mr. Shue [*sic*] might have said to do the hands-on thing if we could have because of it crashing my system." She also testified that she informed Chief Deputy Shew that Griffith was only copying those parts of the video that showed "hands on" defendant Absher, and that she informed Chief Deputy Shew of this fact *before* her department

copied over the original, complete video. During the hearing, defense counsel reviewed this deposition testimony with Hamby while she was on the stand. Defense counsel asked, "So at the time . . . Chief Deputy Shew asked you to preserve only contact hands-on points and was told that's what you had done and said that it was okay, there was still an original version that he could have asked you to copy in its entirety; correct?" Hamby responded, "Yes, sir. As far as I know, that original was still on the view playback." Accordingly, we hold that findings of fact 13, 14, and 15 are supported by competent evidence.

5. Findings of fact 17 and 18. The State next challenges findings of fact 17 and 18, which state:

> 18. Neither Chief Deputy Shue, nor Ms. Suzanne Hamby ever asked Mr. Griffith to maintain the entire unmodified video on a memory stick of this type or by any other means despite receiving the letter sent by counsel for defendant on October 1, 2007.
>
> 19. This modified video removed a sufficient amount of video data to shorten the video from its original 8 gigabytes to less than 750 megabytes, less than one-tenth of the original size of the video. This shortened video was submitted for review to Major Greg Minton of the Wilkes County Sheriff's Department who picked up the video and then according to his testimony did not look at it.

The State argues that there was no evidence that downloading the entire video would be "simple or cheap" or that the Sheriff's Department had the ability to do so in 2007. Neither of the challenged findings of fact states that downloading the entire video would have been either simple or cheap; they merely state that neither Chief Deputy Shew nor Hamby asked Griffith to copy the

entire video. Accordingly, the State's challenge to these findings of fact fails.

6. Finding of fact 21. The State next challenges finding of fact 21, which states, "At no time did any member of the Wilkes County Sheriff's Department make any attempt to go onto a county computer and download or preserve the entire video on a hard drive or other device."

The State argues that "there was no evidence presented, aside from speculative questions, that anyone in the [Sheriff's Department] had the actual, rather than theoretical, capability and knowledge to burn or copy any of the video." As set out above, Griffith testified that several deputies had access to the computer software necessary to access the video feed. Moreover, the State does not argue that the finding itself is not supported by competent evidence; it merely argues that had a member of the Sheriff's Department attempted to download or preserve the entire video, there was no evidence to indicate that he would succeed in such an attempt. Accordingly, the State's challenge to this finding of fact fails.

7. Finding of fact 24. The State next challenges finding of fact 24, which states, "Major Minton testified that in the 4th and 5th gaps of 9 minutes and 3 seconds long and 6 minutes and 3 seconds long, Defendant Absher was clearly visible and that these videos would have been the closest and clearest images and best opportunity to view any injuries that were visible on Mr. Absher's person."

The State argues that there was no evidence that the missing video "would have been the closest and clearest images" of defendant Absher or the "best opportunity" to view his injuries because Major Minton never saw the entire video "and had no idea what the missing portions might contain." We disagree. During the hearing, defense counsel asked Major Minton about several stills from the video that showed defendant Absher's injuries. Major Minton concurred with counsel that the images were "not real clear." Defense counsel asked if Major Minton knew "if there [was] a better picture of those injuries on the period of time that were not kept or maintained." Major Minton responded, "No, sir," and agreed with defense counsel's next question, "Because we have no way of knowing that?" Defense counsel then asked about a particular section of the video, and the following colloquy ensued:

> Q. Now, in the picture, the first time there is a nine-minute break between 11:24 and 11:33, he is in a cell with the door shut?
>
> A. Yes, sir.
>
> Q. Okay. He's pretty close on that camera picture, isn't it?
>
> A. Yes.
>
> Q. And he is farther away every time he is taken out of that room?
>
> A. From that angle, yes, sir, but then another angle picks him up.
>
> Q. But on the other angle, there is people around him all the time; correct?
>
> A. Yes, sir.

> Q. Okay. So in that nine minutes we have the closest view of him of any of these pictures; correct?
>
> A. Yes.
>
> Q. And that's gone?
>
> A. Yes.

Major Minton's testimony indicates that he reached his conclusion about the "closest view" of defendant by inferring that the same camera and camera angle captured defendant during the nine missing minutes. Given the clarity and closeness of the other images captured by that particular camera and camera angle, Major Minton inferred that the clarity and closeness would have been similar during the missing nine minutes of video. This inference is proper, and it supports the challenged finding. Accordingly, we hold that finding of fact 24 is supported by competent evidence.

8. Findings of fact 27 and 28. The State next challenges findings of fact 27 and 28, which state:

> 27. After this video was modified on or about October 20th 2007 and while the video was still available for download in its original unmodified form Ms. Hamby discussed the shortening of the video with Chief Deputy Shue who made no objection to this modification.
>
> 28. Despite having this conversation with Ms. Hamby, and despite both the Sheriff Department's receipt of the letter dated October 1, 2007, Chief Deputy Shue approved the modified video and took no steps to preserve the original video.

The State argues that Chief Deputy Shew testified that he did not know about or approve the modified video, and Hamby testified that any misunderstanding to that respect was a miscommunication.

As explained above in our analysis of findings of fact 13, 14, and 15, competent evidence supports both finding 27 and finding 28.

9. Finding of fact 29. The State next challenges finding of fact 29, which states, "Prior to the modification of this video, a Brady Motion was filed on October 3, 2007. This motion requested all potentially exculpatory evidence including the video in its original form." The State argues that the "motion" was actually a voluntary request for disclosure and it did not specifically request "the video in its original form."

We agree that the *Brady* "motion" was a voluntary request for disclosure, and it appears that defense counsel sent the request to the District Attorney's Office, but did not file it with the court. However, the form is irrelevant; as the U.S. Supreme Court has explained, a *Brady* claim may arise "where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence," *or* "where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way." *Kyles v. Whitley*, 514 U.S. 419, 433, 131 L. Ed. 2d 490, 505 (1995) (citations omitted). The government has a duty to volunteer exculpatory evidence even when it is not specifically requested "when suppression of the evidence would be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Id.* We conclude that, in this case, the trial court's inapt use of the word "motion" does not render the finding of fact unsupported by competent evidence.

We also agree that the voluntary request for disclosure does not specify that the video be "in its original form," but that is a reasonable inference. Defense counsel specifically asked for "all videos of the defendant at the time he was being held by the Wilkes County Sheriff's office in a holding cell prior to hospitalization." "All videos" of defendant during that time period does not mean a redacted or truncated version of the existing videos, especially without any means for defendant to verify that the missing portions were not exculpatory. Accordingly, we hold that finding of fact 29 is supported by competent evidence.

10. Findings of fact 35, 36, 37, 38, and 39. The State next challenges findings of fact 35 through 39, which state:

> 35. This video could have provided videographic evidence of Mr. Absher's injuries and could have served to contradict the testimony of the deputies as to Mr. Absher's conduct on the night in question.
>
> 36. Specifically, Lieutenant Harold Martin testified that at the intake center he punched Defendant Absher in the stomach because he was being violent and aggressive, that Mr. Absher broke free of a handcuff while he was placed on a medical gurney, and that Mr. Absher tipped over the gurney violently and then fell to the ground and had to be picked up by the deputies at the intake.
>
> 37. Upon viewing the modified video at the hearing, Major Minton testified that none of these events were shown on the video portion where Mr. Absher was transferred to the gurney or on any other portion of the video.
>
> 38. These images and/or events do not appear on the video, which was produced by the Wilkes County Sheriff's Department contrary to the testimony of Lieutenant Martin.

> 39) When asked if the fact that these events were not on the video meant that they had not occurred both Lieutenant Martin and Major Minton relied on the erased portions of the videotape to explain why they would not say that these actions had not occurred.

The State argues that "there was absolutely no evidence produced by counsel that the missing portions could have 'served to contradict the testimony' of any State's witness." We disagree. The trial judge watched the modified video, which did not show defendant Absher breaking free of a handcuff, tipping a gurney over, or falling to the ground. Both Major Minton and Lieutenant Harold Martin testified that the modified video did not show these events, although Lieutenant Martin testified that they occurred. The original video might have confirmed their testimony or impeached it. Lieutenant Martin also testified that he did not see any injuries on defendant Absher's face while he was at the intake center. A paramedic examined defendant Absher five minutes later and noted swelling, contusions, bleeding, a fractured skull, and two black eyes. As discussed above, Major Minton testified that the clearest views of defendant's injuries had not been included on the modified video. The original video might have explained the discrepancy between Lieutenant Martin's observations and the

paramedic's.[2] Accordingly, we hold that the challenged findings of fact are supported by competent evidence.

B. Conclusions of Law

Having determined that the challenged findings of fact are supported by competent evidence, we now turn to the challenged conclusions of law. Specifically, the State argues that conclusions of law 4, 5, 6, and 7 are not supported by the findings of fact. We disagree.

1. Conclusion of law 4: Irreparable prejudice. The State argues that the trial court improperly concluded that,

> due to the destruction or failure of the Wilkes County Sheriff's Department to provide this evidence which is material and exculpatory in nature, the Defendant's rights pursuant to the Constitution of the United States and the North Carolina Constitution have been flagrantly violated and there is such irreparable prejudice to the Defendants' preparation of their case that there is no remedy but to dismiss the prosecution.

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[2]The injuries sustained by defendant Absher were quite serious; although he was initially transported to Wilkes Regional Hospital, that hospital did not have the facilities to treat him, so he was transported to Baptist Hospital in Winston-Salem, where he spent ten days in a medically induced coma. Defense counsel planned to introduce evidence that defendant Absher sustained the kind of traumatic head injury that causes subarachnoid hemorrhages. Defense counsel explained that his expert would testify that subarachnoid hemorrhages often cause posttraumatic amnesia, which can last from thirty minutes to four hours, "and during that period of time an individual can walk and talk and have their basic fight or flight responses but ha[ve] no ability to recognize or perceive persons for who they are, whether they are officers, whether they're persons of authority, and has no ability to form a requisite intent to assault anyone."

When a defendant makes numerous requests for "specific items of evidence that were favorable to him and material to his defense, but the State failed to provide the evidence, destroyed it, and then stated it could not be produced," a flagrant violation of the defendant's constitutional rights has occurred. *Williams*, 362 N.C. at 636, 669 S.E.2d at 296. Here, defendant Absher made numerous requests to see the video showing his time at the intake center followed by numerous requests for copies of that video. The State failed to provide the complete video, instead creating a modified copy that excluded twenty-four minutes and seventeen seconds of the original video. The State destroyed the original video, which rendered producing the original video impossible. Thus, a flagrant violation of defendant's constitutional rights occurred.

Irreparable prejudice occurs when a defendant is "denied material evidence favorable to his defense." *Id.*, 362 N.C. at 639, 669 S.E.2d at 298. "As the party moving for dismissal, defendant has the burden of showing irreparable prejudice to the preparation of his case." *Id.* A defendant can meet this burden by demonstrating that the situation cannot be remedied "by ordering or permitting [the] defendant to re-create an item of evidence he did not originally create and for which he does not possess the raw materials." *Id.* at 639, 669 S.E.2d at 299. Here, it is undisputed that defendant Absher never had access to the original video; it cannot be recreated by the State, much less by him. Moreover, the trial court's findings support its conclusion that the missing video segments were material and were favorable to his defense.

The video would have provided better images of defendant Absher's injuries and might have provided evidence demonstrating his impaired mental state. In addition, the video could have been used to impeach some of the State's witnesses. Accordingly, we hold that this conclusion of law is supported by the findings of fact.

2. Conclusion of law 5: *Arizona v. Youngblood*. The State next challenges the trial court's conclusion that the "destruction of evidence violated *Arizona v. Youngblood* in that the evidence was destroyed in bad faith by the Wilkes County Sheriff's Department." We hold that *Arizona v. Youngblood* is not applicable, so no showing of bad faith was required.

In *Arizona v. Youngblood*, the U.S. Supreme Court held that the police's "failure to preserve potentially useful evidence" only constitutes a due process violation if the defendant "can show bad faith on the part of the police." *Ariz. v. Youngblood*, 488 U.S. 51, 57-58, 102 L. Ed. 2d 281, 289 (1988). This rule applies only to "potentially useful evidence," not to "material exculpatory evidence," which does not require a showing of bad faith in order to constitute a due process violation. *Id.* Here, we have already concluded that the missing evidence was material exculpatory evidence, not merely "potentially useful" evidence. Indeed, the trial court had concluded in the previous conclusion of law, discussed above, that the evidence was "material and exculpatory in nature." Accordingly, the *Arizona v. Youngblood* standard does not apply, and defendant Absher was not required to make a showing of bad faith.

3. Conclusion of law 6: *Brady v. Maryland*. The State next challenges the trial court's conclusion that

> [t]his destruction of evidence also violated Brady v. Maryland because the videotapes and images would have been admissible at trial for impeachment purposes during the defendants' cross examination of the State's witnesses, tended to show that the defendant was the subject of a conspiracy to conceal the vicious beating of Defendant Absher and the violation of his federal civil rights, tended to show the physical extent of his injuries in support of his claim of automatism or inability to form the requisite mens rea necessary to commit this crime, and/or tended to prove the partial or complete defense of self defense against the assault charge. This violation of Brady v. Maryland requires dismissal of the charges against both defendants.

Specifically, the State argues that defendant failed to establish that the evidence was favorable to the defense or otherwise "material" to the outcome of the trial. We disagree.

Our Supreme Court explained that, in *Brady v. Maryland*,

> the Supreme Court of the United States determined that the Due Process Clause of the Fourteenth Amendment to the United States Constitution required in state criminal cases "that the suppression by the prosecution 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." [*Brady*, 373 U.S. 83, 87 (1963)] (citing U.S. Const. amend. XIV, § 1). Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence. "Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 131 L. Ed. 2d 490 (1995)). Materiality does not require a "demonstration by a preponderance that disclosure of the suppressed evidence would have resulted

> ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434 (citation omitted).

Williams, 362 N.C. at 636, 669 S.E.2d at 296 (additional quotations and citations omitted). Instead, the defendant "must show that the government's suppression of evidence would undermine confidence in the outcome of the trial." *Id.* (quotations and citation omitted).

Here, the trial court found as fact that the "video could have provided videographic evidence of Mr. Absher's injuries and could have served to contradict the testimony of the Deputies as to Mr. Absher's conduct on the night in question." This evidence would have supported defendant Absher's argument that he lacked the *mens rea* to commit the offense charged, and it also would have provided impeachment evidence against the deputies. *See also id.*, 362 N.C. at 637, 669 S.E.2d at 297 ("The evidence also would have tended to prove the partial or complete defense of self-defense against the assault charge, because proof of the injuries sustained at the Union County Jail would have tended to show that defendant was not the aggressor."). Accordingly, the trial court properly concluded that the evidence was material, and this conclusion is supported by the trial court's findings of fact. The trial court properly concluded that the State's suppression of this material evidence violated due process as explained in *Brady*.

4. Conclusion of law 7: *State v. Williams*. The State next challenges the trial court's conclusion that "the destruction of this evidence violated *State v. Williams* and requires dismissal of the charges against both defendants." In *Williams*, the Supreme Court applied N.C. Gen. Stat. § 15A-954(a)(4), which requires a

finding of "such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution," N.C. Gen. Stat. § 15A-954(a)(4) (2009), in addition to a flagrant constitutional violation before a trial court can grant a criminal defendant's motion to dismiss. *Williams*, 362 N.C. at 639, 669 S.E.2d at 298. As the Supreme Court noted, this requirement stemmed from "*State v. Hill*, in which the defendant was charged with drunken driving, but was not allowed to immediately meet with counsel or witnesses who could have observed him 'with reference to his alleged intoxication.'" *Id.* (quoting *State v. Hill*, 277 N.C. 547, 553, 178 S.E.2d 462, 466 (1971). In *Williams*, the Supreme Court found its "concern in *Hill* regarding the irreparable prejudice to the defendant's ability to 'obtain evidence which might prove his innocence" analogous to its concern for the "defendant regarding the effect of his being denied material evidence favorable to his defense." *Id.* (quoting *Hill*, 277 N.C. at 553, 178 S.E.2d at 466). In *Williams*, the defendant made the necessary showing of irreparable prejudice because competent evidence demonstrated that he was never in possession or control of the original photographic evidence at issue, so the court could not remedy the situation by "ordering or permitting [the] defendant to re-create an item of evidence he did not originally create and for which he does not possess the raw materials." *Id.* at 639, 669 S.E.2d at 299. Here, as in *Williams*, defendant Absher was never in possession or control of the videographic evidence at issue, so the court could not remedy the

situation by ordering or permitting defendant Absher to re-create the missing video. Accordingly, we find support for the trial court's conclusion that the State violated *Williams*, which required dismissal of the charges against defendant Absher.

C. Discovery Violation

The State argues that defendant waived his statutory right to discovery by failing to file a motion for discovery or motion to compel, and by failing to secure an order from the trial court ordering discovery. This argument lacks merit.

Defendant's failure to move to compel pursuant to our discovery rules did not affect his right to *Brady* material. As explained in subsection I.A.9 above, with respect to *Brady* material, the State's affirmative duty to disclose exculpatory or impeachment evidence exists even when a defendant does not act under the rules of discovery.

D. Improper Burden

The State argues that the trial court "predetermined the case and improperly put the burden on the State to convince him not to grant defendants' motion to dismiss" by presuming "bad faith on the part of the State." The State bases this argument on the following statements made by Judge Fox after defense counsel summarized its evidence and arguments at the beginning of the pretrial hearing:

> THE COURT: Okay. Mr. [Prosecutor], I'll hear from you, but let me say this and let me say this before you start. Given what I read here, two things; one, I realize that some

> things are done — sometimes the Prosecutor's job is sort of like that of a mortician, all the damage has been done and all you are trying to do is put your best face on it, but let me say this before you start, I am not persuaded by any arguments given with regard to discovery with regard to this.
>
> The question is whether there was some hardships [*sic*] that was going to be imposed based upon the preservation of this - this evidence or whether there was something - that it was - there was some notice that wasn't received or someone was not aware. But this Court is abundantly aware that - I mean, I don't - I don't for a second presume necessarily bad faith on someone's — anyone's part, generally speaking. But on the other hand, I also don't think evidence generally disappears because it has nothing unfavorable to disclose. So given those parameters, why don't you tell me why I shouldn't allow this motion to dismiss.

"As the movant, defendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case." *State v. Williams*, 362 N.C. at 634, 669 S.E.2d at 295. As explained above, a defendant need not show bad faith on the part of the State if he shows that the State possessed "specific items of evidence that were favorable to him and material to his defense, but the State failed to provide the evidence, destroyed it, and then stated it could not be produced[.]" *Id.*, 362 N.C. at 636, 669 S.E.2d at 296.

Here, Judge Fox had reviewed defendant Absher's motion to dismiss and its attendant exhibits. These materials showed a flagrant constitutional violation and irreparable prejudice to the preparation of his case. Judge Fox's statements demonstrate that he acknowledged this showing by defendant Absher and sought

rebuttal by the State. Moreover, Judge Fox's thorough findings demonstrate that defendant Absher met his burden of showing a flagrant constitutional violation and irreparable prejudice to the preparation of his case. We read Judge Fox's statement that he was "not persuaded by any arguments given with regard to discovery" as a response to the State's assertion that defendant Absher's failure to file a motion to compel negated the State's duty to disclose exculpatory or impeachment material under *Brady*. As discussed above, defendant Absher's failure to file a motion to compel did not affect his rights under *Brady*.

II. Consideration of Outside Matters

The State argues that Judge Fox improperly considered matters that arose in an unrelated case. The State asserts that Judge Fox "was swayed by the happenings of another case set before him in Wilkes County on that day." The State bases this argument on a statement by Judge Fox that referenced an earlier case in which a juror had contact with one of the bailiffs but later denied the contact when Judge Fox asked about it. When asked again, the juror admitted that he and the bailiff had made contact, but that he had not thought it was "that big a deal," so did not disclose it to the court. Judge Fox concluded, "[H]e was willing to be untruthful to the Court in open court about what had transpired, and I'm sure part of it was so that he didn't get the deputy in trouble. That's not lost on this Court."

Having read the context of those statements, it appears that Judge Fox used this story to illustrate how a few seemingly minor transgressions could snowball into a very serious problem. We see no evidence that Judge Fox improperly considered the other matter when deciding this case, but instead used the incident to express how disturbed he was by the government's actions in this matter.

III. Defendant Minton

The trial court's order, as well as both sets of briefs, focused on defendant Absher's role in this matter. However, both defendants appealed. In its brief, the State's arguments address only defendant Absher until the thirty-fifth page of its brief, which contains a single paragraph addressing defendant Minton's appeal. The essence of the State's argument, such as it is, is that defendant Minton was not affected by the State's destruction of the video because she was not in the video. We disagree. As discussed above, the video could have been used as impeachment evidence against several of the deputies involved in defendants' arrests. The loss of this impeachment evidence affected defendant Minton's constitutional rights as well as defendant Absher's. Accordingly, we affirm the order dismissing the charges against defendant Minton.

IV. Conclusion

Accordingly, we affirm the order of the trial court with respect to both defendants.

Affirmed.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).