COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

PAUL C. ERVIN,	§	No. 08-15-00025-CR
Appellant,	§	Appeal from the
v.	§	Criminal District Court No. 2
THE STATE OF TEXAS,	§	of Tarrant County, Texas
Appellee.	§	(TC# 1337034D)

O P I N I O N

Twenty-six-year-old Linda Hayes Ervin was found murdered in the bedroom of her home by means of manual strangulation on June 19, 1985. Although her husband was originally a suspect, he was not indicted until August 7, 2013 following a "cold case" investigation, after which he was charged with one count of murder. Following trial, a jury found Appellant guilty and sentenced him to forty years in prison. Appellant complains that the trial court erred by admitting evidence of an extraneous sexual assault on his wife four months before her murder, claiming that it was not relevant to the murder charge and that it was more prejudicial than it was probative. He further argues that the trial court violated his Sixth Amendment right to confrontation by admitting Linda's hospital records in which she described the sexual assault to her treating physician.

Finally, Appellant challenges the trial court's refusal to dismiss his case due to the State's loss or destruction of potentially useful evidence. For the reasons that follow, we affirm.[1]

FACTUAL SUMMARY

Linda began dating Appellant in the summer of 1984, approximately a year before her death. At the time, she had three sons from prior relationships, G. Hayes, D. Jones, and J. Jackson, who were 12 years old, 9 years old, and 4 years old at the time of her death.[2]

The Prior Sexual Assault

Unfortunately, Linda's relationship with Appellant soon became tumultuous, and over Appellant's objection on relevancy grounds, the trial court allowed the State to introduce evidence that in February 1985, approximately four months before Linda's murder, Appellant had sexually assaulted her in her apartment. The primary source of this evidence consisted of testimony from Linda's two older sons, both of whom testified that they came home from school on February 27, 1985, and observed several individuals, including police officers and paramedics, gathered at the family's apartment. At that time, Linda informed her sons that Appellant had tied her up, burned her, and sexually assaulted her by "shov[ing]" a cucumber into her vagina and anus. Both boys recalled that their mother had burn marks on various part of her body, including her arm, shoulder, leg and face, and observed that she was crying and appeared to be frightened.

Linda was taken to the emergency room at a local hospital for treatment, and over Appellant's "*Crawford*" objection, the State was permitted to introduce hospital records into evidence. The records contained a handwritten description of the assault, signed by a hospital

[1] This appeal was transferred from the Fort Worth Court of Appeals, and we apply the precedent of that court to the extent required by TEX. R. APP. P. 41.3.

[2] Only the older two boys testified at trial.

physician, which Linda had verbally provided to him while in the emergency room. Linda's description to the physician was similar to the one that she provided to her sons, but included additional details, such as her statement that the assault had been precipitated by Appellant's false accusations of infidelity against her.[3]

At Appellant's request, the trial court provided the jury with a limiting instruction:

> You're instructed that if there's any evidence before you in this case regarding the Defendant's having engaged in conduct other than the offense alleged against him in the indictment in this case, you cannot and will not consider said testimony or evidence for any purpose unless you find and believe beyond a reasonable doubt that Defendant engaged in such conduct, if he did, and even then you may only consider the same for the limited purpose of showing all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

The judge also provided an additional limiting instruction in the jury charge, without objection from Appellant:

> You are instructed if there is any testimony before you in this case regarding the Defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of the Defendant, if any, in connection with the offense, if any, alleged against him in the indictment in this case, and for no other purpose.
>
> . . .
>
> You are instructed that you may consider all relevant facts and circumstances surrounding the killing, if any, and the previous relationship existing between the accused and the deceased, if any, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense, if any.

[3] In her description to the physician, Linda reported that Appellant had tied her hands and ankles with a telephone cable, had struck her on the head with his fist, penetrated both her vagina and rectum with cucumbers, and had burned her with a heated-up butter knife on her face, buttocks and genitalia before he left the apartment.

Linda's Move to Liberty

At trial, Linda's sons recalled that shortly after the sexual assault, Appellant apologized to them, and told them that he wished to marry their mother. The couple indeed married and moved into a duplex in Fort Worth with Linda's boys. The two older boys testified that the marriage was troubled from the beginning. The couple argued often and their mother appeared to be frightened of Appellant.

In May 1985, a few months after the marriage, Linda left Appellant and moved with her sons to Liberty, Texas to stay with family members. The boys believed the move was prompted by Linda's fear of Appellant. One of Linda's cousins testified that Linda said she was moving to Liberty to "get away from [Appellant]," as she feared for her safety.

Linda and the boys remained in Liberty for a few weeks before Appellant arrived to take them back to Fort Worth. According to one son, Linda appeared anxious about returning, and told him that, "If anything ever happened to me, I want y'all to stay together." Various members of Linda's family recalled that she appeared to be frightened of Appellant. An aunt remembered that three days before her death, Linda told her that she believed she would not live much longer, which the aunt construed as a reference to Linda's fear of Appellant, adding that Linda even began discussing funeral arrangements during their conversation.

Events Leading up to the Murder

On the day of the murder, Linda had been planning to take her sons to meet with other extended family members for a gathering in a nearby park for a Juneteenth Celebration. Two of Linda's cousins who had planned to join them testified that they telephoned Linda at various times that day but neither was able to reach her.

Although their memories were somewhat unclear on the timing, Linda's two sons testified that they left the duplex that morning, unaccompanied by either their mother or Appellant. In particular, Hayes recalled that, at his mother's request, he had taken his youngest brother with him to buy her cigarettes. Jones recalled that sometime that morning, he also left the house to go to a nearby community center. Jones was the first to return and observed that the front door was locked. He knocked on the door for fifteen minutes, initially receiving no response. At some point, Appellant came to the door, said Linda was sleeping, and then shut the door. Jones waited another ten minutes, and again knocked but received no response.

Hayes and the youngest boy returned to find Jones sitting out front by himself. Hayes also knocked on the door but received no response. All three boys left to spend the remainder of the day with friends, and when they returned in the evening, Appellant informed them that he was taking them to the park where the Juneteenth Celebration was occurring, and left without their mother. Jones was not wearing shoes at the time, and asked to go inside to get them, but Appellant would not allow him to do so.

After arriving at the park, Hayes took the youngest on a carnival ride, while Jones walked through the park with Appellant. Jones recalled that Appellant began walking faster, and was "zigzagging" through the crowd, causing Jones to lose track of him. Jones went to the location where he believed Appellant had parked, but could not find his car. Hayes recalled that when he got off the ride, he could not initially find either Appellant or Jones. When the boys found each other, they looked for Appellant's car once again, but could not find it. Sometime later, they encountered Appellant, who claimed that he had been at the park the entire time. He appeared to be defensive when they questioned him about his whereabouts.

Appellant drove the boys home, but made them remain in the car while he walked to the back of the duplex. Upon entering the home, they noted that the kitchen door was open and the house appeared to be in disarray, with furniture overturned, despite the fact that the family had cleaned the house earlier that morning. Jones recalled that he tried to enter his mother's bedroom, but Appellant quickly shut the door as he approached. Appellant ordered the boys outside, and told them to summon a patrol officer who happened to be parked on the street.

The Initial Police Investigation

At the request of Linda's children, the patrol officer entered the house, found Linda's body in her bed, and called for assistance at approximately 10:30 p.m. The officer and the other officers who arrived several minutes later, observed that the back door was ajar, and that the door showed signs of an apparent forced entry, including "pry marks." The officers also observed that the home appeared to have been "ransacked."

The officers who spoke to Appellant at the scene recalled that Appellant informed them that he had he taken the boys to the Juneteenth Celebration earlier that evening but Linda was too tired to accompany them. When he returned around 10 p.m., he found the house had been broken into and ransacked. The duplex had been burglarized twice that month, and Appellant believed that yet another burglary had occurred.

Detective Larry Steffler, a forensic death investigator with the Tarrant County Medical Examiner's Office, arrived at approximately 11 p.m. and found that the victim was dead from an apparent strangulation with no other signs of apparent "trauma."[4] Detective Steffler also observed

[4] An autopsy performed the next day by the Tarrant County Medical Examiner confirmed that Linda had died of manual strangulation, which the examiner ruled to be a homicide. The examiner also testified that the murderer may have tried to smother Linda as well, based on marks that appeared on her mouth.

that the back door appeared to have been forced open, but he believed that the scene was indicative of a "staged" burglary.

The next morning, Detective Steffler interviewed Linda's two oldest boys, who had spent the night with family members. Although he videotaped his interviews with the boys, the recordings were lost in the decades leading up to Appellant's trial. Detective Steffler was able to produce a copy of a written statement that Hayes provided the day after the murder, and Steffler was able to testify as to his independent recollection of what was said during the interviews. Based on his interviews with the boys and other family members, Detective Steffler was "confident" that Appellant was the murderer. He wrote an affidavit in support of a warrant for Appellant's arrest on July 23, 1985, which included a summary of his interviews with the sons. The matter was turned over to the district attorney's office, and then to the grand jury, which no-billed Appellant sometime in 1985.

The Cold Case Investigation

Linda's case remained unsolved and was considered a "cold case" when Hayes and Jones contacted the Fort Worth Police Department in December of 2011, in an effort to have their mother's case reopened. They first spoke with Detective Manny Reyes and gave statements of the events surrounding their mother's death. Detective Sara Waters took over the case in January 2012 and obtained DNA testing on fingernail clippings that were taken from Linda's body at the time of her death, as well as a DNA sample from Appellant.[5] Amy Smuts, a forensic analyst at the University of North Texas Health Science Center testified that based on her analysis of the

[5] Waters testified that the fingernail clippings, as well as a blood vial and samples from Linda's hair had been preserved in the medical examiner's property room. However, other evidence that had been collected at the scene was never recovered.

DNA samples, she could not "exclude" either Appellant or Linda as being contributors to the DNA found in Linda's fingernail clippings, meaning that the DNA was from either Appellant himself or one of his patrilineal relatives. The DNA sample from the clippings contained DNA from another unidentified male.

Detective Waters interviewed Hayes and Jones, Linda's cousins and her aunt, and Appellant's ex-wife, Annette Council, who married Appellant in July 1987. Council testified that in 1989, she was arguing with Appellant, at which time she asked him if he had murdered Linda. In response Appellant stated: "That bitch got what she deserved, just like you're going to get what you deserve." Frightened by his statement, and believing that this was a threat, Council left Appellant shortly thereafter. She did not report Appellant's statement to the police until she was contacted by them in February of 2013, explaining that Appellant had advised her that he had already been found innocent of Linda's murder.

After completing her investigation, Detective Waters consulted with the district attorney's office, which submitted the matter to the grand jury. Appellant was indicted and charged with one count of murder, for knowingly or intentionally causing Linda's death by means of manual strangulation.

Appellant's Defense

Defense counsel argued that Linda was the victim of a random burglary, claiming that the duplex was located in a high-crime area, and had been previously burglarized shortly before Linda's murder. In support of that theory, counsel emphasized that the DNA samples found in Linda's fingerprints contained the DNA of a third, unidentified male, whom they asserted was likely responsible for the murder. Defense counsel also challenged the credibility of Linda's sons,

contending that their details of what had occurred the morning of their mother's murder had changed over the years. The jury rejected Appellant's defense and found him guilty of Linda's murder. This appeal follows.

ADMISSION OF EVIDENCE OF THE PRIOR SEXUAL ASSAULT

In his first two issues, Appellant contends that the trial court erred by admitting evidence of the prior incident in which Appellant had sexually assaulted Linda four months prior to her death. He complains that the evidence was not relevant to the offense with which he was charged, and it constituted improper "character" evidence, which the trial court admitted in violation of Rule 404 of the Texas Rules of Evidence. He further argues that the evidence was more prejudicial than it was probative, and that the trial court therefore admitted the evidence in violation of Rule 403 of the Rules of Evidence. The State counters that the prior assault was relevant as contextual information to demonstrate the prior relationship between Appellant and Linda under Article 38.36 of the Texas Code of Criminal Procedure, and that its probative value outweighed any danger of unfair prejudice.

Standard of Review

We review the admission of extraneous-offense evidence for an abuse of discretion. *Knight v. State*, 457 S.W.3d 192, 201 (Tex.App.--El Paso 2015, pet. ref'd) (citing *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex.Crim.App. 2009); *Prible v. State*, 175 S.W.3d 724, 731 (Tex.Crim.App. 2005)). A trial court does not abuse its discretion if the decision to admit or exclude the evidence is within the "zone of reasonable disagreement." *Id.* (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1991) (opin. on reh'g)); *see also Garcia v. State*, 201 S.W.3d 695, 704–05 (Tex.Crim.App. 2006) (an appellate court is not free to reverse a lower court's

decision admitting evidence simply because it disagrees with that decision, and should only reverse the trial court if its decision was "outside the zone of reasonable disagreement").

A trial court's determination regarding the admissibility of extraneous-offense evidence typically falls within the zone of reasonable disagreement if the evidence shows: "(1) that an extraneous transaction is relevant to a material, non-propensity issue, and (2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury." *Knight*, 457 S.W.3d at 201–02 (citing *De La Paz*, 279 S.W.3d at 344).

Relevancy Considerations Under Rule 404

Rule 404(b)(1) of the Texas Rules of Evidence provides that extraneous offenses or prior wrongful acts are generally not admissible during the guilt-innocence phase of a criminal trial as evidence that a defendant acted in conformity with his character by committing the charged offense. *Knight*, 457 S.W.3d at 202; *Johnston v. State*, 145 S.W.3d 215, 219 (Tex.Crim.App. 2004). This rule embodies the "established principle that a defendant is not to be tried for collateral crimes or for generally being a criminal." *Knight*, 457 S.W.3d at 202 (citing *Nobles v. State*, 843 S.W.2d 503, 514 (Tex.Crim.App. 1992)). There are exceptions to this principle. The rule itself provides that such "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX.R.EVID. 404(b)(2); *see also Knight*, 457 S.W.3d at 202. In addition, article 38.36(a) of the Texas Code of Criminal Procedure provides that, "[i]n all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused

and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.36(a) (West 2005). The Court of Criminal Appeals has explained that Article 38.36 expressly allows admission of relationship evidence, holding that it not only allows evidence of the "nature of the relationship -- such as whether the victim and the accused were friends, were co-workers, were married, estranged, separated, or divorcing[,]" but also allows evidence of "prior acts of violence between the victim and the accused [when] offered to illustrate the nature of the relationship." *Garcia*, 201 S.W.3d at 702-703.

Although his argument is not entirely clear, Appellant contends that his relationship with Linda was not "material" to any element of the offense with which he was charged, and that the prior assault was not related to any "fact of consequence[,]" i.e., to a fact that would have a bearing on the elements of murder. Instead, he claims that the State clearly sought to admit the evidence for the "very purpose forbidden by the Rules of Evidence -- to prove character for violence and conformance with that character at the time of the murder." He relies primarily on the dissenting opinion in *Garcia v. State*. *Garcia*, 201 S.W.3d at 706 (Price, J. dissenting). There, the court was faced with a similar situation in which a defendant was charged with strangling his wife. *Id.* at 697. At trial, the State was permitted to introduce evidence that the two had a troubled marriage, and that on a prior occasion, the defendant had argued with his wife in the car and had forced her out of the car without her purse or cell phone such that she had to walk two miles before reaching a grocery store where she could call for help. *Id*. The court of appeals found that the trial court had abused its discretion in admitting that evidence. The Court of Criminal Appeals disagreed, finding that the appellate court had failed to consider that the evidence had probative

value to a "material issue" in the case, i.e., the "nature of the relationship" between the defendant and his victim at the time of the offense. *Id*. at 703-05. The court further explained that Rule 404(b) is intended to "prevent a jury that has a reasonable doubt of the defendant's guilt in the charged offense from convicting him anyway based solely on his criminal character or because he is generally a bad person." *Id*. at 704 (citing *Robbins v. State*, 88 S.W.3d 256, 263 (Tex.Crim.App. 2002)).

In his dissenting opinion, Justice Price concluded that the trial court had improperly admitted evidence of a prior act of violence, as he believed the parties' relationship was not material to any "elemental fact" in the case, i.e., a fact related to an element of the offense charged. *Garcia*, 201 S.W.3d at 706 (Price, J. dissenting). But the majority reached an opposite conclusion, and expressly held that a defendant's prior relationship with his victim is a material issue in a murder case, and that a prior act of violence can be probative of a defendant's state of mind at the time of his offense.[6] *Garcia,* 201 S.W.3d at 702-03.

We conclude that the evidence of the prior sexual assault was material to the State's case, as it told the story of the troubled and violent nature of Linda's relationship with Appellant, her reasons for trying to leave him, and the fear that she expressed to various family members in the

[6] Numerous courts, including the Fort Worth Court of Appeals, have reached a similar conclusion. *See, e.g., Malone v. State*, No. 02-10-00436-CR, 2011 WL 5118820, at *1–2 (Tex.App.--Fort Worth Oct. 27, 2011, no pet.) (not designated for publication) (recognizing, in accordance with *Garcia,* that evidence demonstrating that a murder victim had sought a protective order against the defendant prior to her death, was relevant to a "number of material issues in the case -- including the facts and circumstances surrounding the killing, the prior relationship between [the victim] and the defendant, the latter's state of mind, and the identity of the killer"); *Smith v. State*, 314 S.W.3d 576, 592–93 (Tex.App.--Texarkana 2010, no pet.) (relying on *Garcia*, court held that evidence of the defendant's prior acts in which she assaulted her boyfriend's two-year-old daughter, were admissible in her murder trial, for the purpose, among other things, of demonstrating her relationship with the infant); *Chavez v. State*, 399 S.W.3d 168, 172–73 (Tex.App.--San Antonio 2009, no pet.) (holding, in accordance with *Garcia,* that the prior relationship between the defendant and his murder victim as a material issue for "consideration by the jury because it helped illustrate the nature of their relationship," and possibly explained the victim's fear of the defendant and his failure to defendant himself at the time of the killing).

days and weeks leading up to her murder. Contrary to Appellant's claim, the evidence was not introduced for the purpose of establishing Appellant's bad character or that he acted in conformity with his prior act, but was instead expressly admitted to demonstrate the circumstances surrounding their relationship at the time of the killing as reflected by the trial court's limiting instructions to the jury. Consequently, the trial court did not abuse its discretion in finding that the evidence of the prior sexual assault was relevant to a material issue and this decision fell within the zone of reasonable disagreement. *Id*. at 704-05; *see also Pena v. State*, 864 S.W.2d 147, 150 (Tex.App.--Waco 1993, no pet.) (trial court did not abuse its discretion in murder prosecution by admitting evidence of prior assaults and threats of the victim by the defendant, as the evidence was relevant to show the defendant's previous relationship with the victim as well as his state of mind at the time of the offense); *Posey v. State*, 840 S.W.2d 34, 37–38 (Tex.App.--Dallas 1992, pet. ref'd) (in prosecution for murder of wife, trial court properly allowed prosecutor to cross-examine defendant as to whether he had tried to rape his wife several days before she was killed, as evidence of the alleged rape was relevant, among other things, to demonstrate the relevant facts and circumstances surrounding killing and to show the relationship between the defendant and wife); *Gilbert v. State*, 840 S.W.2d 138, 145 (Tex.App.--Houston [1st Dist.] 1992, no pet.) (trial court properly admitted evidence of a threatening letter written by defendant to his murder victim eleven days before her death to demonstrate the "troubled relationship" between the parties, as well as the defendant's emotional state at the time of her death); *Thompson v. State*, 677 S.W.2d 73, 78 (Tex.App.--Beaumont 1983, pet. ref'd) (trial court properly admitted evidence of prior act of violence in which the defendant made threats to his victim to demonstrate the past relationship between the defendant and his victim).

The Balancing Test under Rule 403

Appellant correctly points out that even when a prior extraneous offense is considered to be relevant to the State's case, a court must still conduct a balancing test under Rule 403 to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, rendering it inadmissible under Rule 403.[7] *Garcia*, 201 S.W.3d at 703 (before admitting evidence of a relevant prior extraneous offense, the trial court must determine that the evidence was admissible under Rule 403 of the Texas Rules of Evidence). In conducting a Rule 403 balancing test, the trial court must balance "(1) the inherent probative value of the evidence and (2) the State's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency to confuse or distract the jury from the main issues, (5) any tendency to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or be needlessly cumulative."[8] *See Knight*, 457 S.W.3d at 204 (citing *Gigliobianco*, 210 S.W.3d at 641–42). As the Court of Criminal Appeals has noted, "[i]in practice, these factors may well blend together." *Id.*

[7] Rule 403 provides that: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."

[8] In prior opinions, the court stated that a proper Rule 403 analysis included, but was not limited to, the following four factors: (1) the probative value of the evidence, (2) the potential of the evidence to impress the jury in some irrational yet indelible way, (3) the time needed to develop the evidence, and (4) the proponent's need for the evidence. *See, e.g.*, *Gigliobianco v. State*, 210 S.W.3d 637, 642 (Tex.Crim.App. 2006) (citing *State v. Mechler*, 153 S.W.3d 435, 440 (Tex.Crim.App. 2005)). In *Gigliobianco*, the court announced that it was refining and building upon its previous analysis by revising the test to include the six factors described above, to bring the test "in line with the plain text of Rule 403." *Id.* n. 8.

When Rule 403 is invoked, we presume that the trial court engaged in the required balancing test and we further defer to the trial court's balancing determination. We will reverse a trial court's balancing determination "rarely and only after a clear abuse of discretion" appears in the record. *Booker v. State*, 103 S.W.3d 521, 534 (Tex.App.--Fort Worth 2003, pet. ref'd) (op. on reh'g) (citing *Montgomery*, 810 S.W.2d at 392); *see also Williams v. State*, 958 S.W.2d 186, 195–96 (Tex.Crim.App. 1997). Therefore, we must uphold the trial court's balancing determination as long as it is within the "zone of reasonable disagreement." *Booker*, 103 S.W.3d at 534 (citing *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex.Crim.App. 2002)); *see also Hammer v. State*, 296 S.W.3d 555, 568 (Tex.Crim.App. 2009); *see also Jones v. State*, 944 S.W.2d 642, 652 (Tex.Crim.App. 1996), *cert. denied*, 522 U.S. 832, 118 S.Ct. 100, 139 L.Ed.2d 54 (1997) (recognizing that rules of evidence favor the admission of relevant evidence and carry a presumption that relevant evidence is more probative than prejudicial); *Knight*, 457 S.W.3d at 204 (recognizing the presumption in favor of admission).

The Probative Value of the Evidence and the State's Need for the Evidence

We have already concluded that the evidence of the prior sexual assault was probative and necessary to the State's case as contextual evidence to explain the nature of the victim's relationship with Appellant, and Appellant's state of mind at the time of the offense. Appellant contends that even if the nature of the couple's relationship was relevant to the State's case, the State had less inflammatory means of establishing the troubled nature of their relationship, including the testimony of Linda's family members, who testified regarding the couple's arguments and Linda's fear of Appellant in the days leading up to her murder. But the family members' testimony, standing alone, would have been woefully incomplete without reference to

the prior sexual assault, as the jury would not have been informed of the very reason why Linda was frightened of Appellant, or why she felt the need to move her family to Liberty. In other words, we conclude that the State had a significant need to introduce the evidence to provide the jury with a complete picture of the events leading up to Linda's death, and to establish Appellant's state of mind at the time of her murder. *See, e.g.*, *Smith*, 314 S.W.3d at 591–92 (the State had a significant need to introduce evidence of prior acts of violence between the defendant and her victim in order to rebut the defendant's claim that she was not responsible for the victim's death). As such, we conclude that the first two factors in the *Gigliobianco* test weigh in favor of admission of the evidence.

The Potentially Negative Tendencies of the Evidence

We consider together the next three factors in the *Gigliobianco* analysis, i.e., whether the evidence of the prior sexual assault had a tendency to suggest that the jury would have made a decision on an improper basis, to confuse or distract the jury, or that the jury might have given it "undue weight." *See Gigliobianco*, 210 S.W.3d at 641–42. Although Appellant does not address these factors separately, he generally argues that the evidence of the prior sexual assault had a negative tendency to mislead the jury into convicting him on in improper "moral or emotional basis[,]" given its "inherently inflammatory" nature. In support of this argument, Appellant first asserts that the Court of Criminal Appeals has recognized that "sexually related bad acts and misconduct are 'inherently inflammatory," citing *Pawlak v. State*, 420 S.W.3d 807, 809 (Tex.Crim.App. 2013), *Montgomery*, 810 S.W.2d at 397, and *Wheeler v. State*, 67 S.W.3d 879, 889 (Tex.Crim.App. 2002). In both *Pawlak* and *Montgomery*, however, the court was not speaking of sexual assaults in general; instead, the court opined that "sexually related bad acts and

misconduct *involving children* are inherently inflammatory (emphasis added)"; *Pawlak*, 420 S.W.3d at 809; *see also Montgomery*, 810 S.W.2d at 397 (recognizing that "[b]oth sexually related misconduct and misconduct involving children are inherently inflammatory"). Moreover, the court did not hold that prior acts of sexual assault (whether involving children or not) could *never* be admitted at a defendant's trial.[9] To the contrary, in *Wheeler*, the court ruled that the trial court did not abuse its discretion when it admitted testimony from the niece of a defendant -- who was accused of aggravated sexual assault of his daughter's young friend -- that the defendant had sexually assaulted her when she was six years old. *Wheeler*, 67 S.W.3d at 887-88. Indeed, the court held that the evidence of the prior child sexual assault was relevant to rebut the defendant's various "defensive theories," such as his "frame-up" theory in which he claimed that he was the victim of either revenge or blackmail, and that the evidence had not been introduced as impermissible character evidence in violation of Rule 404. *Id*. In conducting a balancing test under Rule 403, the court recognized that while "evidence of an extraneous sexual offense will always carry emotional weight and the danger of impressing the jury in an irrational and indelible way, our rules of evidence require the exclusion of relevant evidence only if the danger of unfair prejudice, delay, or needless repetition substantially outweighs the probative value." *Id.* at 889.

[9] In *Pawlak*, the defendant was charged with aggravated sexual assault involving five child-complainants. *Pawlak*, 420 S.W.3d at 811. At trial, the State introduced extraneous evidence that Appellant possessed 9,900 images of child pornography -- an offense for which he was not on trial. *Id.* The court held that given the sheer volume of the exhibits presented to the jury on the extraneous offense of possessing child pornography, the admission of the exhibits was unfairly prejudicial as it invited the jury to convict Appellant of sexually assaulting his victims merely due to his possession of the pornography. *Id.* at 811. In *Montgomery*, the defendant was charged with indecency with a child who was not related to him, and the trial court allowed the State to introduce evidence that the defendant had frequently walked around naked, with an erection, in the presence of his own children, either to prove specific intent or to shore up testimony of the complainant. The court concluded that such evidence had only "marginal probative value" and that the danger of unfair prejudice from such testimony was substantial; it further concluded that because the State had no "compelling need" for the evidence, the trial court erred by admitting it. *Montgomery*, 810 S.W.2d at 397.

The court concluded that the trial court's admission of the prior child sexual assault fell within the "zone of reasonable disagreement" that the trial court therefore did not abuse its discretion in admitting evidence of the assault. *Id*. at 889. Accordingly, while we recognize that evidence of a prior sexual assault may carry with it an emotional charge, we conclude, in accordance with the holding in *Wheeler*, that a trial court may nevertheless admit such evidence after carefully balancing the Rule 403 factors.

Appellant next attempts to analogize his case to the Fort Worth Court of Appeals holding in *Booker v. State*, 103 S.W.3d 521, 530 (Tex.App.--Fort Worth 2003, pet. ref'd) (op. on reh'g). There, the defendant was accused of aggravated robbery with a deadly weapon, in which he allegedly approached his female victim from behind, held a knife to her neck, and threatened to kill her. *Id*. at 525-26. At trial, the defendant's primary defense was one of misidentification. *Id.* at 526-27. For purposes of establishing his identity, the trial court allowed the State to introduce evidence of two extraneous unrelated offenses, consisting of one act in which the defendant allegedly kidnapped and sexually assaulted another female victim in the same apartment complex where the victim lived, and a second act in which the defendant allegedly kidnapped a woman and her baby from a different apartment complex. *Id*. at 526-27. The court concluded that the evidence of both acts was relevant under Rule 404(b) to establish identity, given the similar nature of the two offenses. *Id*. at 534-35. However, in analyzing the evidence under the 403 balancing test, the court concluded that the evidence of the second kidnapping was admissible, but that the evidence of the prior sexual assault was not, finding it significant that the prior sexual assault was of a more "inherently inflammatory" nature, and that the State took much longer to develop that evidence of that offense. *Id.* at 535-36. The court further concluded that the State

was not in great need of the evidence, particularly given the victim's "confident" identification of the defendant as her assailant, and that on balance, the danger of unfair prejudice substantially outweighed the evidence's probative value. *Id*. at 536-37. It therefore found that the trial court had abused its discretion in admitting evidence of the prior sexual assault. *Id*. at 537.

Although Appellant suggests that we should similarly conclude that the trial court abused its discretion by admitting Appellant's prior sexual assault, we conclude otherwise. First, we note that in *Booker*, the court found it significant that the extraneous sexual assault was more "aggravated" and "heinous" than the charged offense, making it more inflammatory in nature and more likely to cause the jury to consider it for an improper and "irrational" purpose.[10] *Id.* at 535-36. Here, the prior sexual assault was not more aggravated or heinous than the murder itself, and in fact the opposite is true, as an assault pales in comparison to a murder. *See generally Ransom v. State*, 920 S.W.2d 288, 301 (Tex.Crim.App. 1994) (trial court properly admitted evidence of an extraneous offense of burglary of a motor vehicle where the defendant was charged with murder, recognizing that the extraneous offense was "of a character that pales in comparison to the primary offense," and therefore would not have caused the jury to be swayed to convict the defendant based on evidence of "comparatively minor" extraneous offense); *see also Taylor v. State*, 920 S.W.2d 319, 323 (Tex.Crim.App. 1996) (concluding that a prior murder, "being no more heinous than the second, was not likely to create such prejudice in the minds of the jury that it would have been unable to limit its consideration of the evidence to its proper purpose"); *Chavez v. State*, 399 S.W.3d 168, 172–73 (Tex.App.--San Antonio 2009, no pet.) (the evidence that the defendant beat

[10] We note that the opinion in *Booker* was decided prior to the issuance of the Court of Criminal Appeals opinion in *Gigliobianco* and therefore the court used the four-factor test that was in effect at that time. *Booker*, 103 S.W.3d at 533-34.

his victim in the past was no more inflammatory or prejudicial than the evidence that he beat his victim on the night of the murder).

We also find it significant that, in contrast to *Booker*, the evidence here did not involve an unrelated event with an unrelated victim. Instead, the prior sexual assault was part of the very fabric of the story of Appellant's relationship with his victim, which was one of the main issues in the case, making it a highly relevant and necessary part of the State's case. *See generally Garcia*, 201 S.W.3d at 704. We see nothing in the record to suggest that the jury was not equipped to properly evaluate the probative force of this evidence; to the contrary, the trial court provided the jury with not one, but two, limiting instructions setting out the narrow use for which the jury could consider the evidence. *See generally id*. at 699, 704, ("any potential prejudice was diminished by the trial court's limiting instruction" advising the jury to only consider the evidence for the purpose of determining the defendant's intent or motive). Accordingly, we conclude that the third, fourth, and fifth factors in the *Gigliobianco* analysis weigh in favor of admission of the evidence.

The Concise Nature of the Presentation of the Evidence

And finally, considering the sixth factor in the *Gigliobianco* analysis, we do not believe that the presentation of the evidence consumed an inordinate amount of time nor was it needlessly cumulative. To the contrary, the description of the sexual assault as given by Linda's sons comprised only a small portion of their testimony -- consisting of less than a dozen pages in the reporter's record out of a total of almost 300 pages of their trial testimony, most of which focused on the events that occurred on the day of the murder itself. The admission of Linda's hospital records took very little time, with the prosecutor reading the records into evidence, amounting to less than seven pages in the reporter's record out of a total of almost 800 pages. The hospital

records themselves consisted of eleven pages of exhibits out of a total of approximately 129 exhibits introduced by the State during the trial. We conclude that this final factor also weighs in favor of admission. *See generally Knight*, 457 S.W.3d at 204 (the trial court did not abuse its discretion in admitting extraneous-offense evidence where the evidence was not cumulative of other evidence, and its presentation was concise). We overrule Issues One and Two.

CONFRONTATION CLAUSE

Appellant next argues that the trial court violated his Sixth Amendment right to confront witnesses when it admitted Linda's hospital records containing her description of the assault. In *Crawford v. Washington*, the United States Supreme Court held a defendant's right to confrontation under the Sixth Amendment is violated when a witness is permitted to relate out-of-court "testimonial" hearsay statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *See Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1373–74, 158 L.Ed.2d 177 (2004); *see De La Paz v. State*, 273 S.W.3d 671, 680 (Tex.Crim.App. 2008) ("[T]he *Crawford* rule reflects the Framers' preferred mechanism (cross-examination) for ensuring that inaccurate out-of-court testimonial statements are not used to convict an accused."). The Confrontation Clause, however, does not apply if the witness's out-of-court statement is not considered as one that was "testimonial." *See Vinson v. State*, 252 S.W.3d 336, 338 (Tex.Crim.App. 2008). Therefore, the threshold question for any possible Confrontation Clause violation is whether a statement is testimonial or non-testimonial. *See Crawford*, 541 U.S. at 68, 124 S.Ct. at 1374; *see also Vinson*, 252 S.W.3d at 338. The determination of whether a statement is testimonial is a question of law, and we therefore review a trial court's determination of that question *de novo*. *See Wall v. State*, 184 S.W.3d 730, 742

(Tex.Crim.App. 2006); *see also Langham v. State*, 305 S.W.3d 568, 576 (Tex.Crim.App. 2010); *De La Paz*, 273 S.W.3d at 680.

In determining whether an out-of-court statement made by a witness is testimonial or non-testimonial, our focus centers on the primary purpose of a statement, i.e., whether the statement was procured "with a primary purpose of creating an out-of-court substitute for trial testimony." *See Michigan v. Bryant*, 562 U.S. 344, 358-59, 131 S.Ct. 1143, 1155-56, 179 L.Ed.2d 93 (2011); *see also Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 2274, 165 L.Ed.2d 224 (2006) (statements are testimonial only when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution)." In making this determination, a court must "objectively evaluate the circumstances in which the statement is provided." *Bryant*, 562 U.S. at 358, 131 S.Ct. at 1155. "Generally speaking, a hearsay statement is 'testimonial' when the surrounding circumstances objectively indicate that the primary purpose of the interview or interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *De La Paz*, 273 S.W.3d at 680.

However, when the primary purpose is something other than to provide a record for a future criminal prosecution, the statement is not considered to be testimonial for purposes of the Sixth Amendment. *Bryant*, 562 U.S. 344, 358-59, 131 S.Ct. 1143, 1155-56. Thus, when a witness provides a statement to a medical professional, as opposed to a law enforcement officer, and the statement is made primarily for the purpose of medical treatment, the statement is not typically considered testimonial within the meaning of *Crawford*. *See Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); *see also Weiss v. State*, No. 2-07-390-CR, 2009 WL 4757379, at *12–13 (Tex.App.--Fort Worth Dec. 10, 2009, pet. ref'd) (not

designated for publication) (recognizing that "[m]edical records created for purposes of treatment and admitted under the business records exception are not testimonial under *Crawford*"); *see generally Davis v. State*, 169 S.W.3d 660, 667 (Tex.App.--Austin 2005), *aff'd*, 203 S.W.3d 845 (Tex.Crim.App. 2006) (recognizing that statements made to police officers are more likely to be characterized as "testimonial" in nature).

Virtually all Texas courts that have considered the issue have concluded that when a patient gives a verbal history to a sexual assault nurse examiner or other medical professional during a sexual assault exam for the purpose of receiving medical treatment, the history is not considered testimonial within the context of *Crawford*. *See, e.g.*, *Berkley v. State*, 298 S.W.3d 712, 715 (Tex.App.--San Antonio 2009, pet. ref'd) (holding that statements made by sexual assault victim to a SANE nurse, which were included in medical records, were not testimonial where the statements were made for the purpose of medical diagnosis and treatment); *Herrera v. State*, No. 08-11-00193-CR, 2013 WL 4859311, at *1–4 (Tex.App.--El Paso Sept. 11, 2013, pet. ref'd) (not designated for publication) (the primary purpose of statements made by victim to a nurse during a SANE exam were to allow for the diagnosis and treatment of victim, and therefore the statements were not testimonial in nature and did not violate the defendant's right to confrontation); *Green v. State*, No. 09-15-00220-CR, 2017 WL 391368, at *5 (Tex.App.--Beaumont Jan. 25, 2017, pet.ref'd) (not designated for publication) (sexual assault victim's statements made to a paramedic and nurse following a sexual assault were made for purposes of medical diagnosis and treatment, and were therefore "not of the character of the statements that *Crawford* identified as 'testimonial'"); *Morrison v. State*, No. 2–05–443–CR, 2007 WL 614143, at *4 (Tex.App.--Fort Worth Mar.1, 2007, pet. ref'd) (mem.op.) (not designated for publication) (child's statements to

nurse during a sexual assault exam held to be nontestimonial because purpose of the exam was to ascertain whether child had been sexually assaulted and needed treatment); *Williams v. State,* No. 10-13-00149-CR, 2014 WL 895506, at *1–4 (Tex.App.--Waco Mar. 6, 2014, pet. ref'd) (not designated for publication) (concluding that statements made by victim to nurse during a sexual assault exam were for purpose of receiving medical treatment and their admission therefore did not violate *Crawford*); *see generally Beheler v. State,* 3 S.W.3d 182, 189 (Tex.App.--Fort Worth 1999, pet. ref'd) (the object of a sexual assault exam is to ascertain whether a victim has been sexually abused and to determine whether further medical attention is needed, and therefore, the victim's statements describing the acts of sexual abuse are pertinent to the victim's medical diagnosis and treatment).

The record here indicates that Linda sought treatment immediately following the assault, and provided a verbal history to medical personnel in the emergency room for the sole purpose of receiving medical treatment. Appellant presented no evidence that Linda made her statements to any law enforcement officials or that she made her statements for the primary purpose of creating an out-of-court substitute for trial testimony, or for making a record to establish or prove past events potentially relevant to later criminal prosecution. Accordingly, the statements were not testimonial in nature, and that the admission of the records therefore did not violate Appellant's Sixth Amendment right to confrontation under *Crawford*. We overrule Issue Three.

DENIAL OF MOTION TO DISMISS BASED ON THE LOSS OF EVIDENCE

Prior to trial, Appellant filed a motion to dismiss based in part on the loss of the videotaped recordings that Detective Steffler made at the time Linda's two sons were interviewed the day after her murder. In his fourth and final issue, Appellant contends that the trial court erred by denying

his motion to dismiss, contending that the recordings were "vital" to his case, and that his due process rights were thereby violated as a result of their loss.

Destruction of Evidence

The determination of whether a defendant's due process rights were violated depends on the type of evidence lost or destroyed. *See Salazar v. State,* 298 S.W.3d 273, 277–78 (Tex.App. --Fort Worth 2009, pet. ref'd) (citing *Arizona v. Youngblood,* 488 U.S. 51, 57–58 (1988)). The State has a duty to preserve "material exculpatory" evidence, and its failure to do so violates a defendant's due process rights. *Id.* at 278; *see also California v. Trombetta,* 467 U.S. 479, 488-89, 104 S.Ct. 2528, 2532-34, 81 L.Ed.2d 413 (1984) (discussing the State's duties). In order to be considered "material," lost or destroyed evidence must possess an exculpatory value that was apparent before the evidence was destroyed, i.e., it must be evidence that could be "expected to play a significant role in the suspect's defense," and the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by other "reasonably available means." *Trombetta,* 467 U.S. at 488-89, 104 S.Ct. at 2534; *see also Lee v. State,* 893 S.W.2d 80, 87 (Tex.App.--El Paso 1994, no pet.) (it is not enough to show that the missing or destroyed evidence might have been favorable for the defendant; in order to meet the materiality standard, its exculpatory value must be apparent). When material exculpatory evidence is lost or destroyed, a federal due process violation occurs regardless of whether the State acted in bad faith in failing to preserve the evidence. *Salazar*, 298 S.W.3d at 278 (citing *Illinois v. Fisher,* 540 U.S. 544, 547, 124 S.Ct. 1200, 1201, 157 L.Ed.2d 1060 (2004)); *see also Gelinas v. State,* No. 08-09-00246-CR, 2015 WL 4760180, at *8 (Tex.App.--El Paso Aug. 12, 2015, no pet.) (not designated for

publication) (discussing the distinction between the State's failure to preserve "material exculpatory evidence" and "potentially useful evidence").

However, if the lost evidence is determined to be only "potentially useful" to the defendant's case, the defendant must demonstrate that the State acted in "bad faith" in order to establish a due process violation. *See Ex parte Napper*, 322 S.W.3d 202, 231 (Tex.Crim.App. 2010) (recognizing that when the destruction of potentially useful evidence is at issue, the defendant must, at the least, show "bad faith" on the State's part in destroying the evidence in order to show a due process violation); *see also Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988) (holding that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law); *see also Salazar*, 298 S.W.3d at 278 (citing *Fischer*, 540 U.S. at 547-48) (same).[11] In some cases, however, even potentially exculpatory evidence may be so attenuated that even a showing of bad faith will not afford a basis for relief. *Napper*, 322 S.W.3d at 231.

Were the Lost Recordings Potentially Useful to Appellant's Case?

[11] In both the trial court and on appeal, Appellant argues that the destruction of the evidence in his case violated the "due course of law." In support of this proposition, Appellant relies on the Waco Court of Appeals' holding in *Pena v. State*, 166 S.W.3d 274, 276 (Tex.App.--Waco 2005), *rev'd other grounds*, 285 S.W.3d 459 (Tex.Crim.App. 2009), in which the court held that the "due course clause" in the Texas Constitution provides a "greater level of protection" to a defendant than does the United States Constitution. *Id*. at 276. In *Pena*, the court held that the trial court should have granted the defendant's motion to suppress, which was based on lost evidence, despite the fact that the record contained no evidence of bad faith on the part of the State. *Id.* The Fort Worth Court of Appeals specifically rejected the holding in *Pena*, and has held, in accordance with various other Texas Courts of Appeal, that the Texas Constitution "does not provide a greater level of protection than the United States Constitution regarding the State's loss or destruction of evidence in a criminal prosecution." *Salazar v. State*, 298 S.W.3d 273, 278 (Tex.App.--Fort Worth 2009, pet. ref'd). Instead, the Fort Worth Court of Appeals follows the analysis set forth above, requiring a showing of bad faith when evidence that is only potentially exculpatory is lost or destroyed. *Id*. at 278-79. We therefore follow the Fort Worth Court of Appeals' precedent on this issue.

Appellant appears to acknowledge that the videotaped interviews with Linda's two sons were not materially exculpatory, and he instead argues that the lost interviews were "potentially useful" to his case. He contends that the boys were "key" witnesses who testified to "circumstantial evidence" regarding Appellant's suspicious behavior on the day of Linda's murder. Appellant emphasizes that their recollections changed over the decades that elapsed since Linda's murder. He contends that because of the loss of the videotaped recordings, he was deprived of the ability to cross-examine and impeach them with their prior recorded statements at trial, which he believes would have uncovered contradictory statements the boys made during their initial interviews. Appellant concludes that this, in effect, rendered the sons' trial testimony "unassailable," thereby significantly harming his case.

As a preliminary matter, we note that Appellant did have other means of assailing the sons' trial testimony, such as comparing their trial testimony to the original statement that Hayes made to Detective Steffler the day after the murder, and by comparing the testimony to the summary of the interviews that Detective Steffler included in his arrest warrant. Defense counsel cross-examined Steffler regarding his independent recollection of his interviews with the boys, and further cross-examined the boys in detail, pointing out discrepancies in the sequence and timing of some of the events that occurred that day.

Although it may have been potentially helpful or useful to Appellant's case to be able to point to additional discrepancies that may have been uncovered on the recorded interviews, there is no indication that the recorded interviews themselves would have been materially exculpatory to Appellant's case. To the contrary, Detective Steffler testified that based on these very same interviews, he concluded that Appellant was the prime suspect in Linda's murder and presented

the matter to the district attorney's office on that basis. We conclude that it would not have been apparent to law enforcement that the recordings were materially exculpatory to Appellant's case. To demonstrate a due process violation, Appellant was required to establish that the State acted in bad faith in failing to preserve the recordings. *See generally Gamboa v. State*, 774 S.W.2d 111, 112 (Tex.App.--Fort Worth 1989, pet. ref'd) (recognizing that the loss or destruction of videotapes made after a defendant's arrest fell within the potentially useful category of evidence, rather than the material exculpatory class).

Did the State Act in Bad Faith?

Appellant does not directly address the question of whether the State acted in bad faith, and argues only that the State was "negligent" given the valuable nature of the evidence. Mere negligence, standing alone, is insufficient to sustain a finding of bad faith. *See Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337-38 (where the police department's failure to preserve evidence could, at worst, be described as negligent, and there was no suggestion of bad faith on the part of the police, the court found no due process violation). Instead, there must be some showing of "improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful." *Napper*, 322 S.W.3d at 238. A court may infer bad faith from a variety of factors, such as when the State purposely destroys evidence that was apparently or obviously exculpatory in nature. But when evidence is lost or destroyed as the result of mere negligence on the part of the prosecution, the prosecution's negligence, standing alone, is not sufficient to support such an inference. *Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337-38. A finding of bad faith cannot be sustained where, at most, the prosecution was

aware that its "action or inaction could result in the loss of something that is recognized to be evidence." *Napper*, 322 S.W.3d at 238.

There is nothing in the record to indicate that the Fort Worth Police Department would have been aware that the recorded interviews were materially exculpatory in nature, as Detective Steffler himself believed that the recordings were inculpatory and supported turning the matter over to a grand jury. We conclude that this factor weighs against a finding that the police acted with the intention of harming Appellant's case. *See, e.g., Illinois v. Fisher*, 540 U.S. 544, 548, 124 S.Ct. 1200, 1202, 157 L.Ed.2d 1060 (2004) (no due process violation was found where the evidence that was destroyed was actually inculpatory, rather than exculpatory, and where it was undisputed that the police acted in good faith and in accordance with their normal practice in destroying the evidence); *see also Youngblood*, 488 U.S. at 57, n. *, 109 S.Ct. at 337 ("The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.").

Moreover, the only evidence presented at trial indicated that the interviews were not purposely destroyed, but that they were instead lost when the police department's property room was moved twice during the decades following the murder. Detective Waters, who conducted the cold case investigation, testified that although there was no record of what happened to the recordings, in her opinion the property was accidentally lost during those moves. Detective Steffler, who conducted the original interviews, testified that he had no idea what happened to the recordings, and that he was told only that the recordings were "missing."

And finally, there is nothing in the record to indicate that the police department had any animus toward Appellant that would have caused it to intentionally lose or destroy the recordings to harm his ability to defend himself in a pending prosecution. Although there is no indication of precisely when the recordings were lost, it appears likely that they were lost after the first grand jury no-billed Appellant. The loss appears to have occurred when there was no prosecution pending against Appellant, which also weighs against a finding that the State acted in bad faith in failing to preserve the evidence. *See generally Napper*, 322 S.W.3d at 240 (concluding that police department's actions in "consuming" a cocaine sample during the testing process, without initially notifying the defense, was not done in bad faith, particularly in light of the fact that no prosecution was pending at the time the evidence was destroyed).

We find no evidence that would support a finding that the prosecutor, the police, or their agents acted in bad faith by failing to preserve the recorded interviews. We therefore conclude the trial court did not abuse its discretion in denying Appellant's motion to dismiss based on the loss of those recordings. We overrule Issue Four and affirm the judgment of the trial court below.

ANN CRAWFORD McCLURE, Chief Justice

August 23, 2017

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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