COURT OF APPEALS
DECISION
DATED AND RELEASED

July 8, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3317-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES GARVEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Brown County: RICHARD G. GREENWOOD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Charles Garven appeals a judgment, entered after a jury trial, convicting him of first-degree sexual assault of a child contrary to § 948.02(1), STATS. Garven argues that (1) his due process rights were violated because the officer who questioned him destroyed his field notes after the interview; (2) the trial court erroneously refused to hear evidence and rule on his

post-verdict motion; and (3) the verdict represents a miscarriage of justice. We reject his challenges and affirm the judgment.

Garven argues that his due process rights to present a complete defense were violated by the detective's destruction of field notes. The detective interviewed Garven at his residence for approximately one and one-half to two hours. During the interview, Garven denied touching the child's breast. The detective made handwritten notes of the interview. A day or two later, he typed up a four-page report from his notes and threw the handwritten notes away.

The detective testified that Garven told him that he was just trying to show affection when he hugged the child and kissed her on the lips. Garven told the detective that he put his arms around the child and her friend. The detective testified that when asked if he had touched her breast, Garven responded: "[I]f I did touch her breast, I'm not aware of it and I'm pretty aware of what happened then." The detective stated that he did not record the interview and his report is not verbatim except to the extent indicated by quotations.

Garven argues that his due process rights to present a complete defense were violated by the detective's destruction of his field notes. We disagree. A two-pronged analysis is employed to determine whether the destruction of evidence violates due process. ***State v. Greenwold,*** 189 Wis.2d 59, 525 N.W.2d 294 (Ct. App. 1994): (1) If the evidence destroyed is apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means, its destruction violates due process, ***id.*** at 67-68, 525 N.W.2d at 297, or (2) if the evidence was potentially exculpatory and was destroyed in bad faith, its destruction also violates due process. ***Id.*** The Wisconsin due process clause is the substantial equivalent of its

federal counterpart. ***Id.*** at 68-69, 525 N.W.2d at 298. This issue involves the application of a constitutional standard to the conduct of the police in discarding evidence, an issue of constitutional fact we review independently as a question of law. ***Id.*** at 66, 525 N.W.2d 296.

Garven argues that because the notes acknowledged that Garven denied the allegations, they were apparently exculpatory and their destruction violates his due process rights. We disagree. Garven fails to show that any information of substance contained in the field notes was not also contained in the typewritten report. He points to no discarded information that would have any probable effect on the outcome. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***United States v. Bagley,*** 473 U.S. 667, 682 (1985). Here, the detective testified that the typewritten report was a summation of his notes and contained some direct quotes of Garven. We conclude that Garven fails to demonstrate that the notes were exculpatory in any material way.

Garven further argues that the notes were potentially exculpatory and that the officer destroyed the notes in bad faith. This claim must also fail. For the reasons stated previously, there is no indication that the notes were potentially exculpatory. There is no suggestion that the officer acted in bad faith. The officer testified that he worked for the police department for nineteen years and it was his practice to type up his reports from his handwritten notes and throw the notes away because they were hard to read. Also, the officer's report typed from the notes was made available to Garven.

Garven argues that there was one instance where the officer did not destroy his one page of notes when he interviewed a different witness. The fact that there was an instance in which that officer did not destroy his handwritten interview notes does not demonstrate that in this case he acted in bad faith.

Next, Garven argues that the trial court erred when it failed to rule or hear testimony on his post-verdict motions. We disagree. The record indicates that following the close of the State's case, the defense rested and moved to dismiss or alternatively for a directed verdict on the grounds of insufficiency of the evidence. Argument was heard and the court denied the motion. After the jury returned its verdict of guilty, the court adjudicated Garven guilty as charged. Shortly thereafter, defense counsel stated: "I'd like to make a motion here and then respond to the request to revoke bond. I'm moving to set aside the judgment notwithstanding the verdict. Regarding [the] presentence report that's fine." The record fails to reflect that defense counsel requested to introduce testimony. Also, because Garven's motion to dismiss at the close of evidence had already been ruled upon, and Garven offers no additional grounds for the motion to set aside the judgment, Garven fails to show any prejudice as a result of the lack of a ruling on the record. *See* § 805.18, STATS.

Next, Garven argues that justice miscarried because the evidence was insufficient to support the verdict. He argues that the evidence is conflicting and there is but one incredible shred of evidence to support the conviction, the testimony of the child victim. Conflicts in the testimony are for the jury, not the appellate court, to resolve. ***State v. Poellinger,*** 153 Wis.2d 493, 503, 451 N.W.2d 752, 756 (1990). Because the victim's testimony supports the conviction, the existence of conflicts or contrary evidence fails to provide a basis for reversal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.