

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2008AP2535-CR

Cir. Ct. No. 2007CF128

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID S. WARE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. David Ware, Jr. appeals from a judgment convicting him of substantial battery contrary to WIS. STAT. § 940.19(2) (2007-08). On appeal, he argues that the circuit court should have granted a mistrial because the Ozaukee County Sheriff's Department failed to preserve exculpatory

evidence. We conclude that the evidence, a digital recording, was neither apparently nor potentially exculpatory. Therefore, we affirm the circuit court's denial of Ware's mistrial motion. Even though we affirm, we chastise the detectives in this case for their cavalier attitude toward evidence they collected and failed to preserve.

¶2 The issue on appeal relates to a missing digital recording of a conversation between Ware and the victim, whom Ware beat severely. The detectives gave the victim a digital recorder to record any conversation he might have with Ware in the hope that Ware would inculcate himself in the battery. Although the victim turned over a recorded conversation to the detectives, the detectives did not log the recording as evidence. The recording disappeared after the detectives listened to it and decided that the recording did not have evidentiary value. The existence of the recording was revealed during the victim's trial testimony. Ware sought a mistrial because the recording was either apparently or potentially exculpatory and should have been preserved as evidence. The circuit court denied Ware's mistrial motion because the recording was "almost worthless" from an evidentiary standpoint and lacked any inculpatory statements. The victim, the detectives and Ware testified before the jury about the recorded conversation. The jury convicted Ware.

¶3 On appeal, Ware argues that the recording was apparently exculpatory and even if it was only potentially exculpatory, the detectives acted in bad faith in failing to preserve it. "[T]o rise to the level of a due process violation, evidence not preserved, lost or destroyed by the State 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" *State v. Greenwold*, 189 Wis. 2d 59, 67,

525 N.W.2d 294 (Ct. App. 1994) (citation omitted). The due process analysis is two-pronged: (1) Did law enforcement fail to preserve evidence that was apparently exculpatory, or (2) did law enforcement act in bad faith by failing to preserve evidence that was potentially exculpatory? *Id.* at 67. Our review of the circuit court’s application of this constitutional standard to the detectives’ conduct presents a question of constitutional fact that we review independently of the circuit court. *Id.* at 66.

¶4 All of Ware’s arguments are premised on his contention that the recording had exculpatory value. To resolve Ware’s due process claim, the circuit court was required to make a finding about the evidentiary value of the recording. The circuit court found that from an evidentiary standpoint, the recording was “almost worthless.” This determination is supported by the record before this court. We now turn to that record.

¶5 On the second day of trial, the victim testified that the detectives gave him a recorder, and he called Ware at the detectives’ request in the hope that Ware would make an incriminating statement. Ware asked the victim why he got “the law involved,” and then Ware hung up. The victim recorded the conversation, and he returned the recorder to the detectives thereafter. The State objected on relevance grounds, and the court addressed the issue outside the jury’s presence.

¶6 The whereabouts of the recording had to be determined outside the jury’s presence. The State advised that it did not have the recording, Detective Knowles had no recollection of receiving the recording, and the recording did not appear in the evidence log. The detective who gave the victim the recording device, Detective Milbach, was on leave from the department when the victim

turned in the recording. When Detective Milbach returned to the department, he and Detective Knowles looked for, but could not find, a recording.

¶7 Ware argued that the recording was potentially exculpatory and sought a mistrial. The circuit court found that Ware's mistrial motion was premature because there was no evidence that the recording actually existed.

¶8 The jury returned, and the victim resumed his trial testimony. The victim testified that he received a recorder from the detectives, and he used it to record the call he made to Ware. Ware hung up before the victim had a chance to turn the conversation to his own beating by Ware. The conversation lasted a minute or less. The victim testified that he played the recording back and heard both voices clearly. Detective Knowles retrieved the digital recording device from the victim.

¶9 In a further attempt to discover the whereabouts of the recording, the circuit court heard more testimony outside the jury's presence. Detective Milbach testified that he provided the victim with a working recorder four days after the beating. He told the victim to record any contact with Ware, but he denied telling the victim to call Ware. Detective Milbach listened to the recording provided by the victim, but the recording was just a conversation and had "no content in the case whatsoever." The detective characterized the recording as "two friends talking." There was no discussion of any prior batteries or the victim's battery, and no names were exchanged to identify the parties on the recording. The detectives did not log the recording as evidence or mention it in their reports after deciding that it was only a first contact, and there might be future conversations between the victim and Ware that would have evidentiary value. The recording no longer exists, although the detectives did not erase it. There was no evidence of

which recorder the detectives provided to the victim, and a search did not turn up the recording or any reference to it in any of the case file or detectives' notes. Detective Milbach did not remember if he deleted the recording, although he has lost several recorders in the past.

¶10 Detective Knowles, a junior detective assisting Detective Milbach, testified that Detective Milbach gave the victim the recording device during their first interview. Detective Knowles testified that the victim was directed to call Ware and have a telephone conversation about the battery to get Ware to incriminate himself. A few weeks later, the victim advised Detective Knowles that he had a recording, and the detective picked up the recording device from the victim. Detective Knowles turned the device over to Detective Milbach, and they listened to the recording. Detective Knowles testified that the victim called Ware and they had a short, thirty-second conversation, but there was no discussion of the battery or that anyone said "why did you get the cops involved." Detective Knowles did not log the recording as evidence. Decisions about logging recordings are made on a case-by-case basis. There was no evidentiary value in the recording, although the detective admitted that he could not recall the recording word-for-word. There was no mention of the recording or its contents in the case file or the detectives' notes. There was no process for tracking recorders provided to outside parties, and the recorder's return was not noted in any records. The court then adjourned the case for several days due to scheduling conflicts.

¶11 When the trial resumed, Ware renewed his motion for a mistrial. Because the victim and the detectives did not have the same recollection of the recording, Ware argued that the recording itself was exculpatory and important to the defense, and the detectives failed to preserve the recording as evidence. The

recording's absence constituted a constitutional violation and deprived Ware of a fair trial.

¶12 The State argued that the recording was not exculpatory under any witness's description of it, and Ware was not deprived of the ability to present a defense.

¶13 The circuit court found that from an evidentiary standpoint, the recording was "almost worthless" and lacked any exculpatory statements. Although the recording was subject to interpretation, the recording was not exculpatory *per se*. The parties to the conversation and the detectives who listened to the conversation could relate its contents. The jury could then decide the facts of the recorded conversation. The court likened the situation to having different witnesses testify about their conversation and letting the jury assess the witnesses' credibility. The court denied Ware's mistrial motion.

¶14 The record supports the circuit court's determination that the recording lacked evidentiary value and that Ware was able to present the conversation via witnesses who either participated in the call or listened to the recorded conversation. Ware testified at trial that the recording contained exculpatory statements,¹ the victim testified to his recollection of the call, and the detectives testified that the call had no evidentiary value. All versions of the call were before the jury. Counsel was free to argue the contents and significance of

¹ At trial, Ware testified that he and the victim spoke after the battery. Ware asked the victim why he falsely accused Ware of beating him. The victim responded that he was not pursuing the charges, the investigators were. The victim then asked Ware if he had been involved in other fights in Wisconsin, which Ware denied. Ware described himself as angry and confrontational during the call, and he asserted his innocence during the call.

the recording, and the jury was free to assess the witnesses' credibility. We conclude that the recording was not apparently exculpatory and Ware was able to "obtain comparable evidence by other reasonably available means." See *Greenwold*, 189 Wis. 2d at 67.²

¶15 Ware cannot prevail on the second prong of the due process analysis: bad faith by failing to preserve potentially exculpatory evidence. The court implicitly found that the detectives did not act in bad faith when they failed to preserve the recording because the recording was "almost worthless" and lacked inculpatory statements. There was no evidence that the detectives were aware of the recording's usefulness or potentially exculpatory value or that they acted consciously to suppress exculpatory evidence or with official animus. See *id.* at 69.

¶16 Because the absence of the recording did not amount to a due process violation, the circuit court did not erroneously exercise its discretion when it denied Ware's mistrial request. See *State v. Ross*, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122.

² Because each witness's version of the recording was before the jury, this is not a case like *State v. Hahn*, 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986) modified by *State v. Greenwold*, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994). Before Hahn's accident reconstruction expert could examine Hahn's truck, which Hahn was driving at the time of the crash, the truck was released to a scrap yard and partially dismantled. *Id.* at 354. Hahn had a statutory defense that the truck had a mechanical defect and would have crashed, killing the victim, even if Hahn had not been drinking and driving. *Id.* at 358-59. Because the truck had been partially dismantled, Hahn's expert could not tell whether a defect existed. *Id.* at 359-60. The State knew that the truck had apparently exculpatory value and destroying the truck deprived Hahn of other comparable evidence. *Id.* at 360. Hahn's due process rights were violated because the State failed to preserve this evidence.

In this case, the conflicting testimony about the contents of the recording was available to the court and jury. Ware had another way to present the contents of the recording, via witness testimony, and he was not deprived of his defense.

¶17 Even as we reject Ware’s due process challenge, we are compelled to remark on the detectives’ cavalier, pick-and-choose approach to preserving evidence they gathered. Had the detectives retained and logged the recording, which they initiated as part of the battery investigation, the recording would have been discoverable by Ware. The extensive motion proceedings in the circuit court and the appeal to this court on this issue could have been avoided.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

