COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP88-CR **Cir. Ct. No. 2012CF412**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KARL W. NICHOLS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Reversed and cause remanded for further proceedings*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 KLOPPENBURG, P.J. This appeal concerns defense counsel's failure prior to trial to request that the State produce a written list that M.R.W., the child victim of an alleged sexual assault by Karl Nichols, had presented at the conclusion of a second forensic interview, and which M.R.W. said was "things

that ... I changed from the [first forensic] interview" three months earlier.[1] After a trial at which the video recordings of both interviews were played to a jury, and several witnesses including M.R.W. testified, the jury found Nichols guilty of first-degree sexual assault of a child. On Nichols's post-conviction motion, the circuit court vacated the judgment of conviction and dismissed the case with prejudice. The court ruled that Nichols's trial counsel provided ineffective assistance by failing to request the list prior to trial, and that the State failed to preserve and produce the list in violation of Nichols's right to due process. The State appeals. We conclude that the circuit court should have rejected Nichols's ineffective assistance and related due process arguments.

¶2 In addition, Nichols argues that we previously erred when we denied his motion to dismiss this appeal for lack of jurisdiction. Nichols contends that we erred on the merits of that motion and that it was additional error to decide the motion in a one-judge order. We reject both arguments. Finally, we deny Nichols's motion for sanctions for a frivolous appeal. Accordingly, we reverse and remand for further proceedings.[2]

[1] The circuit court found that on the pad of paper that M.R.W. presented at the conclusion of the second interview was "a written list of corrections" from the first interview. While the writing is not visible in the video recording of the second interview, which we have reviewed, the parties do not dispute that it is a list, and in their briefs they refer to it as "the list." Accordingly, we also refer to the writing as "the list."

[2] Because the circuit court dismissed the case with prejudice, the court did not consider the part of Nichols's postconviction motion that sought a modification of his sentence based on the Department of Corrections' determination that he does not need sex offender treatment. That motion remains to be addressed on remand.

BACKGROUND

¶3 We briefly state the following undisputed background facts in this section, and relate additional facts as needed in the discussion that follows.

¶4 M.R.W's family and Nichols's family were part of a childcare cooperative formed with other families in Madison after M.R.W. and Nichols's oldest son were born in 2001, and M.R.W. continued to have play dates at Nichols's house from the time the children were approximately three years old until M.R.W.'s family moved to Kansas in 2010. In September 2011, when M.R.W. was ten years old, she told her mother that Nichols had touched her vagina during one sleepover at Nichols's house when they lived in Madison ("the touching incident").

¶5 M.R.W. participated in two videotaped forensic interviews in Kansas on September 26 and December 22, 2011. City of Madison Police Detective Justine Harris participated in the second interview by telephone.

¶6 In March 2012, the State filed a criminal complaint charging Nichols with first-degree sexual assault of a child between September 15 and October 31, 2005, when M.R.W. was four years old, concerning the touching incident. Following a jury trial in November 2013, Nichols was convicted of the charged offense and sentenced to five years of probation.

¶7 In May 2015, Nichols filed a postconviction motion raising several claims, including that the State failed to preserve and disclose exculpatory evidence—the list—in violation of Nichols's right to due process, and that Nichols's trial counsel was ineffective for failing to raise that issue before trial. The circuit court held an evidentiary hearing on Nichols's postconviction motion

in August and September 2015. Prior to the hearing, the State determined that the list could not be located. The court subsequently issued a written decision and order granting the postconviction motion as to the exculpatory evidence claims, vacating Nichols's conviction, and dismissing the case with prejudice.

¶8 Within forty-five days of the circuit court's decision, the State filed with the clerk of the circuit court a notice of appeal signed by the assistant district attorney.

DISCUSSION

¶9 In the sections that follow, we first explain why the circuit court should have rejected Nichols's ineffective assistance and related due process arguments concerning the list. We then address and reject Nichols's arguments that: (1) we lack jurisdiction to hear this appeal because the district attorney, rather than the attorney general, filed the notice of appeal; (2) a one-judge order was an improper means of disposing of Nichols's motion to dismiss based on lack of jurisdiction; and (3) this appeal is frivolous.

I. Ineffective Assistance of Counsel and Due Process Arguments Concerning the List

¶10 We first address the proper analytical framework for reviewing Nichols's arguments concerning the list.

¶11 The additional facts pertinent to the proper framework are as follows. The record reveals that Nichols's trial counsel had viewed the video recordings of the interviews no later than five months after the second interview took place and at least seventeen months before trial, but did not before trial ask the State to produce the list. From what we can discern from the record, Nichols

first stated his concerns about what might be on the list, and that he had never been provided with the list, in his personal remarks at sentencing. The State then investigated and discovered that the list could not be located.

¶12 After sentencing Nichols filed his postconviction motion, in which he alleged that his trial counsel was ineffective "for failing to recognize or pursue the State's failure to disclose [the list]," and that his right to due process was violated because the State failed to preserve the list. Nichols did not develop this ineffective assistance argument in his postconviction motion, nor does he address this ineffective assistance issue on appeal. Rather, both in his postconviction motion and on appeal, Nichols argues solely that his right to due process was violated pre-trial by the prosecution's failure to preserve the list.

¶13 Nichols's framing of the issues does not make sense because there is no allegation that, prior to trial, the list had been discarded or lost. And there is no developed argument that, in the absence of a request, the prosecution was required to disclose the list because it was in fact exculpatory, rather than merely potentially exculpatory. In the absence of such an allegation, we assume that Nichols means to allege that his trial counsel was ineffective for failing to request the list prior to trial on grounds that it was potentially exculpatory. To be clear, such a request might have led to the discovery that the list had not been preserved and, in that event, counsel might have pursued a due process claim prior to trial. This is the framework that the circuit court appears to have followed, when it stated, "[h]ad counsel recognized and raised the issue of [the list] pretrial, [the list] might have been found," and that if not found, Nichols could then have argued his due process claim prior to trial. We agree with the circuit court's framing of the issues, and follow that framework here. Accordingly, we first address whether Nichols's trial counsel was ineffective for failing to request the list before trial,

and then we address Nichols's claim that he was denied due process by the State's failure to preserve the list.

A. Ineffective Assistance of Counsel Claim

¶14 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation was deficient and that the deficiency prejudiced him. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To prove deficient performance, a defendant must show that, under all of the circumstances, counsel's specific acts or omissions fell "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To prove prejudice, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If we conclude that a defendant has not proved one prong, we need not address the other. ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325.

¶15 We uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. We review de novo whether counsel's performance was deficient or prejudicial. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694.

¶16 We first review the relevant additional facts and then explain why we conclude that Nichols fails to show that his trial counsel's failure to request the list before trial prejudiced him.

1. Relevant facts

¶17 As stated above, M.R.W's family and Nichols's family were part of a childcare cooperative formed with other families in Madison after M.R.W. and Nichols's oldest son were born in 2001, and M.R.W. continued to have play dates at Nichols's house from the time the children were approximately three years old until M.R.W.'s family moved to Kansas in 2010. In September 2011, when M.R.W. was ten years old, she told her mother that Nichols had touched her vagina during one sleepover at Nichols's house when they lived in Madison (the "touching incident").

¶18 M.R.W. participated in a videotaped forensic interview in Kansas on September 26, 2011. M.R.W. related that she had sleepovers at Nichols's house, that from ages four to seven she and Nichols's son played at wrestling and attacking Nichols, that the two children often wrestled with little or no clothing, that she took off her clothes when she got hot, and that Nichols did not object and encouraged them.

¶19 M.R.W. stated that she remembered "the big thing," which happened when she was four or five. She stated that during one sleepover when she could not sleep, she went upstairs and sat with Nichols on a chair and he felt around the inside and outside of her vagina with his hands. He told her that he wondered what it was like to have a vagina because he did not have one, and asked her before he touched her. She did not object because she did not think there was anything wrong with it at the time. She said that it was hard for her to remember how she felt. She stated that this touching happened only once.

¶20 M.R.W. also described one time when Nichols told her to tell her mother that they had gone to bed at 10:00, when they had actually stayed up until

much later, and one time when Nichols gave her a sponge bath. She said that nothing else happened that she could think of.

¶21 The Dane County District Attorney's office asked that a second forensic interview be conducted, in part because the first interview had not been conducted under oath. The second interview was conducted by the same interviewer in the same place on December 22, 2011. City of Madison Police Detective Justine Harris participated in the second interview by telephone.

¶22 At the second interview, M.R.W. had a pad of paper either on her lap or right next to her. M.R.W. gave the oath and said that she had watched the video recording of the first interview. She answered more questions about the touching incident. She said that during a sleepover she could not sleep, went upstairs, and told Nichols she could not sleep. She could not remember whether he was already there or whether he heard her and came downstairs to where she was. She said that they walked to the yellow chair, Nichols beckoned her to come sit with him and patted his lap, she climbed up and sat on his lap, they sat for a bit, he asked if he could touch her vagina because he wondered what it was like to be a girl and to have a vagina, she said yes and unzipped her footie pajamas, and he reached under her underwear and touched around the outside and inside of her vagina with both of his hands. She said that it was the only time Nichols touched her, and that she was sure it happened only once. M.R.W. also described in greater detail the sponge bath.

¶23 M.R.W. said that everything that she said at the second interview "as far as [she could] remember ... was true."

¶24 Twice near the end of the second interview, the interviewer asked M.R.W. if she had any questions for the interviewer, and each time M.R.W.

answered, "No." The interviewer then asked M.R.W., "[D]id you write some things down that you were wondering about or did you write it down for someone?" M.R.W. answered, "I wrote [down some] things that I think I, I changed from the last interview. I think that [Nichols] didn't suggest ... that I would take my clothes off. I think I took them off and he didn't object." The interviewer asked whether M.R.W. felt like it was her fault that she had not objected "to any of this." M.R.W. answered that she did but felt better after talking to a therapist. The interviewer then began escorting M.R.W. out of the room. As M.R.W. followed the interviewer she raised her pad of paper and asked, "First can I tell you, um, the rest of this?" The interviewer responded, "Sure. We can do that and then I'm going to take a copy of it so that [the counselor and Detective Harris] can have it, too."

¶25 In March 2012, the State filed the criminal complaint charging Nichols with first-degree sexual assault of a child between September 15 and October 31, 2005, when M.R.W. was four years old, concerning the touching incident.

¶26 Nichols's trial counsel received and reviewed the video recordings of the two interviews of M.R.W. before the preliminary hearing on May 2012. The jury trial took place in November 2013, when M.R.W. was twelve.

¶27 The video recordings and written transcripts of the interviews were presented to the jury, after M.R.W. testified that she told the truth during the interviews. At the trial, M.R.W. testified about the sponge bath and the time Nichols told her to lie about when they went to bed. She described the chair in which she and Nichols sat during the touching incident, and identified in photographs the chair and room where that incident took place. She testified that

she and Nichols talked about her Halloween costume while she was on his lap. When asked why she waited so long before telling anyone about the touching incident, she testified that she really loved Nichols and did not want him to get into trouble, and that it took her a long time to realize that she should not worry so much about him if he was not worrying about her.

¶28 As stated above, the first time Nichols mentioned the list that M.R.W. presented at the end of the second interview was in his personal remarks to the circuit court at sentencing, after which Detective Harris investigated and determined that the list could not be located. Detective Harris had herself never received the list, and had not requested the list before her postconviction investigation.

2. Analysis

¶29 As we now explain, we conclude that Nichols cannot show that he was prejudiced by the failure of his trial counsel, prior to trial, to request that the State produce the list. More specifically, Nichols has failed to demonstrate that the list had potential exculpatory value. Accordingly, his ineffective assistance of counsel claim fails.

¶30 Neither Nichols on appeal nor the circuit court in its decision suggests that the list was exculpatory because the list may have corrected some fact in M.R.W.'s initial interview in a manner supporting the view that sexual touching did not happen. Indeed, M.R.W.'s consistent, detailed recitation of the facts surrounding that incident in the two interviews and at trial would defeat such a proposition. Rather, the gravamen of the circuit court's analysis of the exculpatory nature of the list is that "[t]he case rose or fell on M.R.W.'s credibility," and the corrections on that list, regardless of how significant, would

have greatly diminished her credibility and "enabled the defense to strongly discredit M.R.W.'s memory, honesty and motives." The State argues that the list lacked exculpatory value because it would have enhanced, not impeached, M.R.W.'s credibility. We agree with the State.

¶31 Seemingly, Nichols's proposition in support of the circuit court's decision must be that M.R.W. impeached herself in the second interview by correcting a statement that she made in the first interview, and that her credibility might have been further undercut with the list. This argument does not withstand scrutiny.

¶32 The only reasonable inference from the facts—that M.R.W. had reviewed the first interview before participating in the second interview, and that she had a list of changes to make of some things she said in that first interview—is that she spoke accurately, truthfully, and consistently with her corrections, in the second interview. More specifically, if she was telling the truth about the corrections, and through the corrections was making sure that what she had said in the first interview was accurate, then there is no basis to suspect that her detailed description of the touching incident in the second interview was not congruent with whatever corrections were on her list. In other words, if the jury believed her statement that she got some things wrong in the first interview, they would have believed her more detailed description of the touching incident in the second interview.

¶33 Although Nichols does not mention it, the one correction that M.R.W. made at the end of the second interview, that Nichols did not suggest that she take off her clothes but only did not object when she did, may have been helpful to Nichols with respect to the wrestling described by M.R.W. in the first

interview. However, Nichols does not explain how it can reasonably be inferred that whatever else was on the list would tend to, or lead to evidence that would tend to, establish Nichols's innocence. This is true because jurors understand that a witness like M.R.W., years later, may have a faulty memory as to some related facts, but would clearly recall the dramatic event of an adult male putting his fingers into her vagina. And, as to this core event, M.R.W. described it consistently and in detail in both interviews. Moreover, it is likely that jurors would view corrections by M.R.W. as favorable to M.R.W.'s credibility because it shows her to be someone trying to get all details right.

¶34 For these reasons, we conclude that any corrections in M.R.W.'s list would not have risen to the level of being exculpatory evidence. Accordingly, Nichols could not have been prejudiced by his trial counsel's failure to request the list pre-trial.

¶35 In his brief on appeal, Nichols does not address prejudice or explain how the list was exculpatory. Rather, his only response to the State's argument that the facts show that the list was not exculpatory, is his reliance on the circuit court's finding that the exculpatory nature of the list was "apparent" to the Kansas interviewer and on what Nichols asserts is the court's finding that the exculpatory nature of the list was also "apparent" to Detective Harris.

¶36 As to the finding that the exculpatory nature of the list was "apparent" to the Kansas interviewer, we find no basis in the record to support this finding. It is not possible for the circuit court to know whether the list was apparently exculpatory without knowing the contents of the list. Nevertheless, we proceed to address the circuit court's reasoning.

¶37 The circuit court inferred that the Kansas interviewer must have recognized the exculpatory nature of the list because of the manner in which she "hurried to change the subject, leave the room and stop the taping" after M.R.W. explained the first item on her list. We have reviewed the video recording,[3] and it shows that, as the interview drew to a close, the interviewer gave M.R.W. several opportunities to ask the interviewer questions and to relate what was on her list, and the interviewer continued to be patient with M.R.W. as she related her first correction. More specifically, in response to the first correction that M.R.W. related, rather than rush M.R.W. out the door, the interviewer further spoke with M.R.W. The video simply does not support a reasonable view that the interviewer hurried to change the subject. Upon our de novo review, we conclude that the exculpatory nature of the list was not apparent to the interviewer.

¶38 As to Nichols's assertion that the circuit court inferred that the exculpatory nature of the list was apparent to Detective Harris, Nichols is simply wrong. Rather, the court found incredible the detective's postconviction testimony as to her perception of the significance of the list and accorded it no weight.

¶39 For the reasons above, Nichols's ineffective assistance of counsel claim fails.

[3] This court has a vantage point equal to that of the circuit court in reviewing the video recording as part of our evaluation of the legal question as to whether the list was exculpatory. *See* ***State v. Jimmie R.R.***, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (1999) (when the only evidence on a factual question is reflected in a video recording, the court of appeals is in the same position as the circuit court to determine a question of law based on the recording).

B. Due Process Claim

¶40 "[T]he due process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the State to preserve exculpatory evidence." ***State v. Greenwold***, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994 (***Greenwold I***). "The state's duty to preserve exculpatory evidence is limited to evidence that 'might be expected to play a significant role in the suspect's defense.'" ***State v. Hahn***, 132 Wis. 2d 351, 358, 392 N.W.2d 464 (Ct. App. 1986) (quoting ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985), (citing ***California v. Trombetta***, 467 U.S. 479, 488 (1984)). Exculpatory evidence is defined as "[e]vidence tending to establish a criminal defendant's innocence." ***Black's Law Dictionary***, 675 (10th ed. 2014).

¶41 The State's failure to preserve evidence violates a defendant's right to due process if the State: "(1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory." ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (citing ***Arizona v. Youngblood***, 488 U.S. 51, 57-58 (1988) (***Greenwold II***).

¶42 Under the first prong, a defendant must show that the evidence had an exculpatory value that was apparent to those who had custody of the evidence before it was lost, and that the defendant cannot obtain comparable evidence by other reasonably available means. ***State v. Munford***, 2010 WI App 168, ¶21, 330 Wis. 2d 575, 794 N.W.2d 264; ***Greenwold II***, 189 Wis. 2d at 67-69 (citing ***Trombetta***, 467 U.S. at 489). Under the second prong, potentially exculpatory evidence includes evidence "whose contents are unknown" and which could have led to other evidence that "might have exonerated the defendant." ***Youngblood***,

488 U.S. at 57-58. Where the State has failed to preserve potentially useful evidence, the defendant can show bad faith only if: "(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." ***Greenwold II***, 189 Wis. 2d at 69 (alteration in original).

¶43 The remedy for a due process violation based on the State's failure to preserve exculpatory evidence is for the circuit court, in the exercise of its discretion, to "choose between barring further prosecution or suppressing ... the State's most probative evidence." ***Hahn***, 132 Wis. 2d at 361 (quoting ***Trombetta***, 467 U.S. at 487).

¶44 We uphold the circuit court's factual findings unless they are clearly erroneous. ***Hahn***, 132 Wis. 2d at 356-57. We review de novo whether the State's failure to preserve evidence violated the defendant's right to due process. ***State v. Weissinger***, 2014 WI App 73, ¶7, 355 Wis. 2d 546, 851 N.W.2d 780; ***Greenwold II***, 189 Wis. 2d at 66-67.

¶45 To repeat, in his postconviction motion Nichols alleged that the State violated his right to due process by failing to preserve the list. It is not apparent from the record how Nichols would have known before trial that the list could not be located, in light of his trial counsel's failure to request it. But, as he found out postconviction, that turned out to be true. Regardless, his due process claim fails because, as we have already explained, the list lacked any exculpatory value.

II. Filing of Notice of Appeal

¶46 Nichols argues that we lack jurisdiction to hear this appeal because the district attorney, rather than the attorney general, filed the notice of appeal, and therefore the notice of appeal was invalid.[4]

¶47 This argument requires us to engage in statutory interpretation, which presents a question of law that we address de novo. ***Juneau Cty. v. Associated Bank, N.A.***, 2013 WI App 29, ¶15, 346 Wis. 2d 264, 828 N.W.2d 262. The purpose of statutory interpretation is to discern the intent of the legislature. ***Id.***, ¶16. We interpret statutory language in the context in which it is used, in relation to the language of surrounding or closely related statutes, and in a reasonable manner, to avoid absurd or unreasonable results. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

¶48 WISCONSIN STAT. § 165.25(1) (2015-16)[5] provides that "[t]he department of justice shall ... appear for the state and prosecute or defend all actions and proceedings, civil or criminal, *in* the court of appeals and the supreme court, in which the state is interested or a party." (Emphasis added.) Thus, all papers that are filed *with* the court of appeals and the supreme court in the course of the prosecution or defense of an action *in* those courts must be filed by the

[4] The State argues that even if the district attorney were not authorized to file the notice of appeal, that would not render the notice of appeal jurisdictionally ineffective. We do not reach that issue, because our conclusion that the district attorney is not prohibited from filing the notice of appeal is dispositive. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

department of justice. The specific statute addressing the filing of the notice of appeal does not reference who should file the notice of appeal. Rather, the statute merely states that "[a] person shall initiate an appeal by filing a notice of appeal with the clerk of the circuit court ...." WIS. STAT. RULE 809.10(1)(a); *see also* WIS. STAT. § 974.05(1) (the State may appeal "in the manner provided for civil appeals under chs. 808 and 809").

¶49 Nichols points to no statute requiring that the department of justice must be the party that files a notice of appeal with the circuit court. To the contrary, WIS. STAT. § 978.05(1) seemingly provides authority for a district attorney to file a notice of appeal in the circuit court because it directs that district attorneys prosecute criminal cases "*before*" the circuit courts for their counties. (Emphasis added.)

¶50 While the notice of appeal initiates the appeal under WIS. STAT. § 809.10(1), the appeal is not *in* the court of appeals until the clerk of the circuit court files the notice *in* the circuit court and transmits a copy of the notice of appeal to the court of appeals, *and* the clerk of the court of appeals upon receipt of the notice files the appeal *in* the court of appeals. WIS. STAT. § 809.11(2) and (3). Once the notice of appeal is filed *in* the court of appeals, the department of justice assumes representation of the State under WIS. STAT. § 165.25(1). That is why, as Nichols notes, papers required to be served on the State in criminal appeals in which the department of justice has assumed representation of the State, must be served on the attorney general. *See* WIS. STAT. § 809.80(2)(b).

¶51 Nichols argues that the distinction in WIS. STAT. § 978.05(5) between the district attorney's authority to "brief and argue" felony appeals at the request of the attorney general and the district attorney's authority to "represent"

the State in misdemeanor appeals, means that the district attorney has no authority to file a notice of appeal in the former, because "brief and argue" is narrower than "represent" and does not include filing a notice of appeal. Nichols appears to argue that only "represent" encompasses the filing of a notice of appeal, and because the district attorney does not represent the State in any felony appeals, the district attorney is not authorized to file a notice of appeal. We are not persuaded. Under our conclusion as stated above, nothing prohibits the district attorney from filing a notice of appeal in a circuit court, regardless of whether or not the attorney general asks the district attorney also to "brief and argue" the case thereafter.

¶52 WISCONSIN STAT. § 974.05(3), which directs the district attorney to serve the notice of appeal on the defendant, confirms that a district attorney properly files the notice of appeal that must be served. As the State notes, it would be unreasonable to interpret the statutes cited above to require only the attorney general to file the notice of appeal, but the district attorney to serve a copy of the notice of appeal that the attorney general filed. Under WIS. STAT. § 801.14(4), "[t]he filing of any paper required to be served constitutes a certification by the party or attorney effecting the filing that a copy of such paper has been timely served on all parties required to be served." If the attorney general were required to file the notice of appeal, the attorney general could not reasonably certify that a copy of the notice was served by the district attorney—a different attorney in a different office over whom the filing attorney has no supervisory control. Implicit in WIS. STAT. § 974.05(3) is that the district attorney may properly file the notice of appeal that the district attorney must serve.

¶53 Nichols points to three instances in which a person files a paper but the court serves it. *See* WIS. STAT. §§ 971.17(4)(b), 971.17(5), 980.08(2). But, in all three instances, the court serves a petition for release from or termination of

commitment only when an institutionalized person is without counsel. Here, where there is an attorney of record, that attorney both files and serves the pleading in the court in which the attorney has appeared. Nichols also points to three instances where the hearing examiner, judge, or court issues a paper and the department, sheriff, or law enforcement officer, respectively, serves it. *See* WIS. STAT. § 111.39(4)(d), ch. 811, § 51.20(2). Nichols does not explain how any of these instances are akin to an attorney certifying the service of a paper that the attorney has filed, and, therefore, we reject the argument as undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

¶54 Finally, Nichols refers to cases holding invalid notices of appeal that were signed by individuals not authorized to practice law in Wisconsin. Because we have concluded that the notice of appeal in this case was validly filed by the assistant district attorney, the cases cited by Nichols concerning invalid notices of appeal are inapposite.

¶55 In sum, we reject Nichols's argument that the notice of appeal was invalid because it was filed by the district attorney rather than the attorney general. Therefore, Nichols's argument that we lack jurisdiction based on that asserted invalidity fails.

III. One-Judge Denial of Motion to Dismiss

¶56 Nichols argues that we improperly denied in a one-judge order Nichols's motion to dismiss this appeal, and that the issues he raised in his motion "merit proper review by a panel of judges of this Court." Because those issues are

being reviewed by this panel of judges, his argument is moot. As we proceed to explain, Nichols's "one-judge" argument is also without merit.

¶57 Nichols contends that this court's internal operating procedures, specifically WIS. CT. APP. IOP VI(3)(c) (Nov. 30, 2009), require that a motion to dismiss must be addressed by a panel of judges. Nichols does not, however, provide authority for the proposition that a failure on our part to follow our own internal operating procedures, in the absence of a violation of a statute, case law, or some other authority apart from our self-imposed operating procedures, requires a remedy. Thus, we reject Nichols's one-judge argument as unsupported by legal authority. Nonetheless, to correct any misunderstanding on Nichols's part, we also address the merits of his argument.

¶58 The internal operating procedure provision Nichols relies on states:

> The motions judge may act on all motions, except those that reach the merits or preclude the merits from being reached, which can only be acted on by the panel. The motions judge may direct that any motion be acted on by the panel. The panel considers motions that reach the merits, that preclude the merits from being reached, or that have been referred by the motions judge.

¶59 As we stated in our order denying Nichols's motion for clarification of our order denying his motion to dismiss, his motion to dismiss did not reach the merits of the appeal or preclude the merits from being reached because it was denied. Therefore, the motions judge properly acted on it. Nichols argues that such reasoning ignores the requirement in the last sentence of the provision that motions that reach the merits or that preclude the merits from being reached be considered by a panel of judges. However, reading the entire provision in context, it is clear that the motions judge is to refer to a panel of judges for their

consideration motions to dismiss that may be granted, because granting a motion to dismiss does preclude the merits from being reached.

¶60 The fact that the motions judge denied the motion to dismiss the appeal does not prevent this panel from considering the merits as an appellate issue. ***Kiser v. Jungbacker***, 2008 WI App 88, ¶10 n.4, 312 Wis. 2d 621, 754 N.W.2d 180. Nor is a three-judge panel of the court of appeals assigned to hear an appeal bound by a decision of the motions judge. ***Id.*** As we stated in ***Kiser***, "we view the motions judge's ruling as more a decision to have the issue[s] fully briefed rather than handled as a motion to dismiss." ***Id.***

IV. Frivolous Appeal

¶61 Nichols argues that he is entitled to sanctions for the State's frivolous appeal. Because the State has prevailed, it is readily apparent that this appeal is not frivolous. Accordingly, we deny Nichols's motion for costs and fees based on a frivolous appeal.

CONCLUSION

¶62 For the reasons stated above, we reverse the order vacating Nichols's conviction and dismissing the case with prejudice, and we remand for further proceedings. We also deny Nichols's motion for sanctions based on a frivolous appeal.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.