COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1496-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DUANE E. BOLSTAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Duane E. Bolstad appeals from a judgment convicting him of endangering safety by use of a dangerous weapon, in violation

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

of WIS. STAT. § 941.20(1)(d) (1995-96).[2] He asserts that the State denied him the meaningful opportunity to present a defense, thereby violating his constitutional right to due process, when it destroyed a deer carcass during the time between a previous trial and a retrial.[3] He argues that the exculpatory nature of the deer carcass was apparent to the State before the State destroyed it, and that he could not obtain comparable evidence by other reasonable means. He also asserts that, if the carcass was not apparently exculpatory, it was at least potentially exculpatory. He argues that the police acted in bad faith, knowing the deer was potentially useful before they destroyed it, with the conscious effect of denying Bolstad access to the carcass. Because we conclude that the carcass was not apparently exculpatory, and that the State did not act in bad faith, Bolstad's right to due process was not violated when the State destroyed the deer carcass. We therefore affirm.

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[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted. WISCONSIN STAT. § 941.20 states in relevant part:

> (1) Whoever does any of the following is guilty of a Class A misdemeanor:
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> ….
>
> (d) While on the lands of another discharges a firearm within 100 yards of any building devoted to human occupancy situated on and attached to the lands of another without the express permission of the owner or occupant of the building.

[3] A six-person jury found Bolstad guilty of the charged offense in June 1997. His conviction was set aside when the supreme court held that the State could not force a defendant in a criminal case to trial before only six jurors. ***State v. Hansford***, 219 Wis. 2d 226, 230, 580 N.W.2d 171 (1998). He was subsequently found guilty by a twelve-person jury, precipitating this appeal.

BACKGROUND

¶2 On November 28, 1996, Bolstad, Francis Thayer, and Ed Beese went on a hunting excursion. Bolstad shot a deer while on land owned by William W. Schubring. He did not have permission to hunt on Schubring's land.

¶3 Norris Albrechtson lived on the land adjacent to Schubring's property. He heard a gun shot and believed that it was right next to his house. He had not given anyone permission to shoot a firearm within 100 yards of his home. Albrechtson walked to the top of his driveway and saw a pickup truck down the road. He walked over and spoke with Thayer. He then noted Thayer's license plate number and returned home. Bolstad and Beese dragged the deer back to the truck and left with Thayer.

¶4 Albrechtson complained to the county sheriff, who then called Conservation Warden Ronald Nevra. Nevra met with Albrechtson at his home. Nevra investigated the scene and contacted Conservation Warden Richard Wallin. Wallin went to Albrechtson's residence, and concluded that the deer had been shot from a point within 100 yards of the corner of Albrechtson's house.

¶5 Nevra interviewed Bolstad. Bolstad told Nevra that he had been hunting on a different property earlier, had shot a deer and wounded it, and thought the deer he shot near Albrechtson's home was the same deer. Nevra took Bolstad's deer hunting license and confiscated the deer carcass.

¶6 Bolstad was convicted of violating WIS. STAT. § 941.20(1)(d), endangering safety by use of a dangerous weapon. He appeals.

ANALYSIS

¶7 Whether the trial court erred in applying a constitutional standard, here due process, is a constitutional fact, which we review de novo. ***State v. Greenwold***, 189 Wis. 2d 59, 66, 525 N.W.2d 294 (Ct. App. 1994).

¶8 The Due Process Clause of the United States Constitution requires that criminal defendants be afforded a meaningful opportunity to present a complete defense, in order for criminal prosecutions to comport with prevailing notions of fundamental fairness. ***California v. Trombetta***, 467 U.S. 479, 485 (1984). In order to safeguard the right to present a complete defense, the Supreme Court has developed an area of constitutionally guaranteed access to evidence which delivers exculpatory evidence into the hands of the accused. ***Id.*** The State's duty to preserve evidence is limited to evidence that "might be expected to play a significant role in the [defendant's] defense." ***Id.*** at 488.

¶9 There are two different standards for measuring whether the destruction of evidence violated due process guarantees. Under the first standard, the evidence: (1) must have possessed an exculpatory value that was apparent before the evidence was destroyed; and (2) be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means. ***Id.*** at 489. This standard was adopted by Wisconsin in ***State v. Oinas***, 125 Wis. 2d 487, 488, 373 N.W.2d 463 (Ct. App. 1985).

¶10 Under the second standard, however, when the evidence is only potentially useful rather than apparently exculpatory, there is no denial of due process unless the defendant can show that the State acted in bad faith. ***Arizona v. Youngblood***, 488 U.S. 51, 58 (1988). In adopting this test, we have determined that bad faith can only be shown if: (1) the State was aware of the potentially

exculpatory value of the evidence that it failed to preserve, before it destroyed the evidence; and (2) the State acted with official animus or made a conscious effort to suppress the evidence. ***Greenwold***, 189 Wis. 2d at 69.

¶11 Bolstad asserts that his due process rights were violated under either the ***Oinas*** or the ***Greenwold*** standard. We first consider whether Bolstad's due process rights were violated under the ***Oinas*** test.

¶12 Bolstad contends that, had the carcass not been destroyed, he would have had an opportunity to inspect it, and prove that the deer was shot twice: once before he was on Schubring's property, and once while he was on Schubring's property. He argues that this would have supported his credibility. His credibility thus supported, the jury would have been more likely to believe that his own measurements of the distance from the house to his shooting location were more accurate than those of the State. Since his measurements showed that he was more than 100 yards from Albrechtson's home when he shot the deer, he would not be guilty of the offense. Bolstad argues that the deer carcass was apparently exculpatory, and that he could not have obtained comparable evidence by any other available means.

¶13 We disagree. The State may not withhold evidence which is exculpatory and material to either guilt or punishment. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). The issue on which Bolstad's guilt or innocence depended was his location when he shot the deer on Schubring's property, not whether he shot the deer twice. Therefore, whether Bolstad shot the deer once or twice is not materially exculpatory within the meaning of ***Brady***. Nor are we convinced that the number of the times the deer was shot was material to Bolstad's credibility. Though Bolstad asserts that a twice-shot deer is an oddity that would ordinarily be

unbelievable, there is no record evidence as to how often or seldom that this happens. We cannot say that the introduction of a twice-shot deer carcass into the trial evidence would have significantly increased Bolstad's credibility. We therefore conclude that the carcass was not apparently exculpatory.

¶14 We next consider whether Bolstad's due process rights were violated under the ***Greenwold*** test. Bolstad contends that, because Warden Nevra testified about the carcass during the first trial, the State knew that it was important to both Bolstad's and the State's cases. The State, Bolstad asserts, knew the theory of the defense (namely, that Bolstad had shot the deer twice, the second time while on Schubring's property but not within 100 yards of Albrechtson's home) and consequently, the value of the deer carcass to that defense.

¶15 Even were the carcass potentially exculpatory, there is no record evidence that the State was aware of the potentially exculpatory nature of the carcass before it was destroyed. Nevra testified that he destroyed the deer carcass after the first trial due to lack of storage space in his freezer. The record does not reflect that Nevra knew there would be a new trial. Defense counsel had failed both to inspect the carcass and to introduce it into evidence at the first trial. Nevra testified that he found only one entrance wound after skinning the deer, and Bolstad did not challenge this testimony upon cross-examination. Bolstad has failed to show that the State was aware of the potential exculpatory nature of the evidence before it was destroyed.

¶16 Bolstad must also demonstrate that the State acted with official animus or made a conscious effort to deny Bolstad access to the evidence. Bolstad fails to offer any argument on this prong of the bad faith analysis. Having failed to demonstrate the State knew of the potentially exculpatory nature of the deer

carcass before it was destroyed, and that the State acted with either official animus or made a conscious effort to deny him access to the carcass, Bolstad has failed to show that his due process rights were violated under ***Greenwold***. We therefore conclude that the State's destruction of the deer carcass did not deny Bolstad due process of law.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. WIS. STAT. RULE 809.23(1)(b)4 (1997-98).