

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 15, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

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. 01-0835-CR**

**Cir. Ct. No. 99 CM 8481**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**RANDY A. WEISHAR,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

¶1 FINE, J. Randy A. Weishar appeals from a judgment entered on a jury verdict convicting him of criminal damage to property. See WIS. STAT. § 943.01(1). The jury acquitted Weishar of the crime of failing to give information or render aid following his striking an occupied vehicle. See WIS. STAT. §§ 346.67(1)(a) & 346.74(5)(a). The sole issue argued on appeal is whether the trial court erred when it denied Weishar's motion to dismiss the charges

because the State had allegedly not produced potentially exculpatory evidence. We affirm.

## I.

¶2 The two charges lodged against Weishar stem from a violent dispute he had with a neighbor, John Selby, that escalated until Weishar's van either struck or was struck by Selby's truck. Who struck whom was the core of the case. Weishar claimed that Selby backed into him; Selby claimed that Weishar rammed him.

¶3 On October 12, 1999, Weishar sought to have Selby produce for scientific inspection the rear brake light bulbs from Selby's truck. At the October 22, 1999, hearing on Weishar's motion, Weishar represented to the trial court that his expert would be able to determine from the bulbs who hit whom. The trial court indicated that it was going "to allow" Weishar to "get at" the bulbs, but it did not enter a formal order directing either Selby or the State to produce them. The prosecutor indicated, in essence, that he would try to facilitate Weishar's request. Five weeks after the motion hearing, the prosecutor wrote to Selby saying that he, the prosecutor, had spoken to Weishar's lawyer, who indicated that Selby "may drop the light bulb off at his office."

¶4 Selby never did deliver the light bulbs to the office of Weishar's lawyer, and, on March 16, 2000, Weishar went back to court to have the charges dismissed. Weishar made it clear that he was not seeking the light bulbs from the State, but from Selby. Weishar conceded in response to the trial court's question that the "particular light bulb is not in the care, custody or control of the District Attorney's Office or the police department." The State, appearing by a different prosecutor than had appeared at the October 22 hearing, told the trial court that

there was a note in the State's file that yet a third prosecutor had told Weishar's lawyer that he, Weishar's lawyer, should pick up the bulbs from Selby. Weishar's lawyer told the trial court that he would "gladly call" Selby. The trial court observed that there was nothing in the record showing that Selby had not cooperated with Weishar's lawyer and that Selby "has not been the obstacle" to Weishar getting the light bulbs. The trial court did not grant Weishar's motion to dismiss.

¶5 Five weeks later, the parties were in court again. Weishar's lawyer told the trial court that although he "had difficulty getting ahold [*sic*] of Mr. Selby" he "did talk to him," but Selby did not keep an appointment to turn over the light bulbs. The trial court set a date for the trial, indicating that it did not "feel there was [*sic*] diligent efforts to get this bulb." The trial court denied Weishar's oral motion to dismiss the case. It set the trial for June 26, 2000. The trial started August 23, 2000. Weishar's lawyer never did get the light bulbs.

## II.

¶6 The prosecution must disclose to a defendant "[a]ny exculpatory evidence" that is "within the possession, custody or control of the state." WIS. STAT. § 971.23(1)(h). Additionally, the State may not hide evidence favorable to a defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process"). As we have seen, Weishar's trial lawyer conceded that the light bulbs he sought for use at trial were not within the scope of § 971.23. Moreover, Selby is a private citizen and is thus not in the broad definition of "prosecutorial unit" to which the disclosure requirements of § 971.23 apply. See *State v. DeLao*, 2001 WI App 132, ¶¶14-22, 246 Wis. 2d 304, 310-314, 629 N.W.2d 825, 828-830.

Additionally, Weishar has not even alleged, no less shown, that the State interfered with his ability to test the bulbs. Indeed, Weishar's trial lawyer conceded that the State fully cooperated in his efforts to get the bulbs from Selby.

¶7 Imposition of sanctions for a discovery violation is within the trial court's discretion. *State v. Martinez*, 166 Wis. 2d 250, 259, 479 N.W.2d 224, 228 (Ct. App. 1991); *State v. Wild*, 146 Wis. 2d 18, 28, 429 N.W.2d 105, 109 (Ct. App. 1988). Here, the State neither violated WIS. STAT. § 971.23 nor the *Brady* rule; the trial court did not erroneously exercise its discretion in denying Weishar's motion to dismiss.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

