COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2513-CR **Cir. Ct. No. 2006CF3811**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY MAURICE HURST,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Timothy M. Hurst appeals from a corrected judgment of conviction for burglary with a person present, false imprisonment while armed, substantial battery while armed, and a judgment of conviction for armed robbery, all as a party to the crime, contrary to WIS. STAT. §§ 943.10(2)(e),

940.30, 940.19(2), 939.63, 943.32(1)(a), (2), and 939.05 (2005-06).[1] Hurst argues that the trial court erred in denying his motion for a mistrial and motion to dismiss because an ID card found at the scene of the crime, which was later lost by police, was evidence containing exculpatory value that was apparent to police and was of such a nature that he would not have been able to obtain comparable evidence by other reasonably available means. Hurst claims that the loss of the ID card violated his due process rights. Because we conclude that the lost ID card was merely potentially exculpatory evidence and that there was no bad faith on the part of the police, we affirm the trial court's denial of Hurst's motions.

I. BACKGROUND.

¶2 During the early morning hours of July 20, 2006, an armed robbery and burglary occurred in the apartment of Mathew Gasparek and Eric Cohen. Gasparek, the only person home at the time, was awoken by having a gun thrust in his mouth. He was subsequently forced to lie on his stomach with his face down and was tied up. Gasparek believed, by virtue of the voices he heard, that there were four separate intruders.

¶3 A neighbor called the police at about 4:00 a.m. and reported seeing four men loading various items into a van. When police officers arrived, they

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

The charges for burglary with a person present, false imprisonment while armed, and substantial battery while armed, all as a party to the crime, are listed on the corrected judgment of conviction. For reasons that are unclear from the record, the armed robbery as a party to the crime charge is listed on a separate judgment of conviction, which references a violation of WIS. STAT. § 943.32(2), as opposed to § 943.32(1)(a) and (2) in accordance with the jury verdict form.

found a fifth man, Dash Brown, who was the driver of the van.[2] A few minutes after arriving, police officers arrested Hurst. Hurst was apprehended when he was spotted by police officers running towards Gasparek's and Cohen's apartment. Hurst claimed that he was there to buy marijuana from Cohen.

¶4 At trial, Brown and James Genous, another one of the men who was arrested for his involvement in the crimes, testified against Hurst in accordance with their plea agreements. Brown testified that Hurst helped to plan the robbery because Gasparek owed someone money from a drug deal. Genous testified that "somebody owed Tim [Hurst] some money, so we [were] just going for him to get his money."

¶5 Police officers found numerous items inside of the van that had been removed from the apartment. Additionally, police officers found a backpack inside of one of the bedrooms of the apartment that contained a bottle of whiskey along with some pantry items. Gasparek indicated to one of the detectives that the backpack was not his, but that he thought it belonged to Cohen. Trial testimony revealed that two days after the incident, Gasparek and Cohen went to the police station. Cohen informed the lead detective on the case that the backpack was not his and gave the detective an ID card that Cohen had found inside the backpack.

¶6 The detective testified that she "remember[ed] reviewing the i.d., running it through our system, through our computers." The detective concluded that the ID card was a valid Wisconsin driver's license, that it belonged to a black

[2] Two of the five men alleged to have been involved had not yet been located at the time of Hurst's trial.

male, and that there were no open warrants for the person identified on the card.[3] She also determined that the ID card did not belong to Hurst, to Brown, or to anybody who was named by Brown as being involved in the crime. Furthermore, the detective testified that the ID card did not belong to Genous. Unfortunately, the ID card was lost prior to trial. When asked when she last saw the ID card, the detective answered, "[p]robably [in the] middle of August," approximately eight months before the trial began.

¶7 Hurst moved for a mistrial and to dismiss, alleging that the lost ID card—which Hurst's attorney first learned about during Cohen's testimony—was clearly exculpatory evidence and that it had been unlawfully suppressed by the State. The State contended that the loss of the ID card, which occurred early on in the investigation, was neither of special importance nor was there any reason to believe that it was exculpatory evidence or that it was intentionally lost. The trial court took the motions under consideration but allowed the trial to continue.

¶8 The jury found Hurst guilty of burglary with a person present, false imprisonment while armed, substantial battery while armed, and armed robbery, all as a party to the crime. At Hurst's sentencing hearing, the trial court ruled on his motion to dismiss due to the missing ID card. The trial court found that because the ID card had been lost at such an early point during the investigatory process, the court was unable to tell whether it was exculpatory or not. The court stated that it was unfortunate that the loss of the ID card had not been disclosed to

[3] Outside the presence of the jury, the detective who lost the ID card testified at a hearing on Hurst's motion to dismiss. Initially, the detective testified that "[t]here was a warrant for the person on that i.d." However, when questioned by Hurst's attorney, she clarified that the person on the ID card did not have any open warrants.

Hurst prior to trial, but that a grant of Hurst's motion for a mistrial, or even an earlier disclosure by the State that the ID card existed, but had been lost, "really wouldn't help anything." In conclusion, the trial court denied the motion to dismiss, finding that Hurst had received value from the ID card by arguing that it belonged to a possible phantom burglar or robber, and that Hurst had received a fair trial. Hurst was sentenced to twelve years of incarceration and ten years of extended supervision on the armed robbery charge, and the sentences on the other charges were stayed. This appeal follows.

II. ANALYSIS.

¶9 Hurst contends that the trial court erred in denying his motion for a mistrial because the State's failure to preserve the ID card was a failure to preserve evidence that had exculpatory value to him. Hurst asserts that the exculpatory value of the ID card was apparent to police and that he was unable to obtain comparable evidence by other reasonably available means; thus, he claims his due process rights were violated when the trial court denied his motion for a mistrial. In support, Hurst claims that when police lost the ID card, he "lost a chance to prove his innocence" because "[t]here is a reasonable possibility that the ID card belonged to one of the robbers." Hurst alleges that if he had known the name on the ID card, he could have shown that the person on the ID card was involved in the robbery, instead of himself. Additionally, Hurst claims that he "could have shown that Brown and Genous were lying when they gave the names of the remaining three accomplices."

¶10 "The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court." ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. "The trial court must determine, in light of the

whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. The denial of a motion for mistrial will be reversed only on a clear showing of an erroneous use of discretion by the trial court." ***Id.*** (citation omitted). Our review entails determining "whether the court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***State v. Foy***, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996).

¶11 When the police fail to preserve evidence, the defendant's due process rights can be violated in either of two ways. *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (***Greenwold II***). The first is when police fail to preserve evidence "that might be expected to play a significant role in the suspect's defense." ***California v. Trombetta***, 467 U.S. 479, 488 (1984). To satisfy this standard, the evidence must both: (1) "possess an *exculpatory value* that was *apparent* to those who had custody of the evidence ... before the evidence was destroyed, *and* (2) ... be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[4] ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985) (emphasis in ***Oinas***).

¶12 The second way is when the police, acting in bad faith, fail to preserve evidence that is merely potentially useful. ***Arizona v. Youngblood***, 488

[4] Hurst contends that the trial court erroneously exercised its discretion by applying the wrong standard when it stated that Hurst had "not established that the card itself was *clearly* exculpatory," because Hurst was required to show that the ID card was *apparently* exculpatory. (Emphasis added.) However, we agree with the State that the trial court "simply used the wrong terminology" in applying the correct legal standard. Because the trial court applied the correct standard, it did not erroneously exercise its discretion by merely using the wrong terminology.

U.S. 51, 58 (1988); ***State v. Greenwold***, 181 Wis. 2d 881, 884-85, 512 N.W.2d 237 (Ct. App. 1994) (***Greenwold I***) (adopting the federal ***Youngblood*** analysis). The defendant has the burden of proving bad faith by showing that the police acted with official animus or made a conscious effort to suppress the evidence. *See* ***Greenwold II***, 189 Wis. 2d at 69-70.

¶13 Whether the State's loss of the ID card violated Hurst's due process rights raises a question of constitutional fact, which we review *de novo*. *See* ***id.*** at 66. However, we uphold the trial court's findings of historical fact unless clearly erroneous. ***State v. Martwick***, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552. "Therefore, unless the evidence was apparently exculpatory, or unless the officers acted in bad faith, no due process violation resulted." ***Greenwold I***, 181 Wis. 2d at 885.

¶14 Regardless of whether we analyze this case under ***Trombetta*** or under ***Youngblood***, Hurst's appeal cannot succeed. Hurst argues that the lost ID card possessed exculpatory value that falls under the standard set forth in ***Trombetta***. In support, Hurst first alleges that the ID card had exculpatory value to him because "it could have impeached Brown and Genous which would have created reasonable doubt as to [his] involvement in the crime." He contends that the ID card's exculpatory value was apparent to police because "[o]n the night of the crime, police found the backpack and photographed its contents (they apparently did not see the ID card in the backpack)," and when Cohen brought the ID card to the police station and informed the detective that it did not belong to him or to Gasparek, Hurst argues, "[t]he exculpatory value of the ID must have been apparent to [the detective] before she lost it." (Parenthetical in brief.) Furthermore, Hurst contends that the detective's initial check of the ID card is proof that the exculpatory value of the ID was apparent to her because "[i]f the

exculpatory value was not apparent to [the detective], she would not have investigated the ID, or attempted to preserve it."

¶15 Additionally, Hurst claims that the ID card was of such a nature that he was unable to obtain comparable evidence by other reasonably available means. Hurst alleges that due to the lack of anyone's knowledge as to the name of the owner of the ID card, there was no reliable way to determine whether it belonged to one of the robbers, and that if the person on the ID card was involved in the crime, it would have proven that Genous and Brown lied as to their accomplices.

¶16 First, Hurst has not established that the exculpatory value of the ID card was apparent to police. Hurst's contention that the detective's initial check of the ID card is proof of its apparent exculpatory value has no merit. The lead detective testified that when the ID card was received by police she ran the ID card through the police computer system, found nothing that she felt was of particular importance at that early stage of the investigation, and put the ID card in a folder, never to be seen again. This reflects no more than a possibility that the ID card might have been useful to Hurst if it had not been lost. The "possibility" that the ID card "could have exculpated" Hurst if it had been preserved "is not enough to satisfy the standard of constitutional materiality in ***Trombetta***." *See* ***Youngblood***, 488 U.S. at 56 n.*.

¶17 Further, the detective's actions when the ID card was turned over to her and her testimony make it clear that the value of the ID card was not apparent to her. First, after conducting initial research on the ID card to determine whether the person reflected on it was involved in the crimes, the detective "put [the ID card] in the file for further investigation." The detective testified that the ID card "may or may not have been related" to the investigation, stating that it "might

have been [evidence]. It was possible, but [she] wasn't sure." There is no indication that the ID card was evidence "that might [have been] expected to play a significant role in [Hurst's] defense." *See* ***Trombetta***, 467 U.S. at 488. On the contrary, the detective's testimony clearly indicates that she was not aware of whether the ID card would or would not be of any relevance to the investigation; thus, the exculpatory value of the ID card was not apparent to the detective.

¶18 It is illogical to conclude that Hurst would have been absolved from committing the crime, and that this was apparent to the detective, had the ID card not been lost. There are multiple scenarios in which Hurst still could have been found guilty. For instance, the ID card could have belonged to one of the two participants who had not yet been apprehended at the time of Hurst's trial. The ID card also may have belonged to a person unrelated to the crime, such as someone who had attended the party that had taken place at the apartment just hours before the crime occurred. In either circumstance, Hurst is neither exonerated nor incriminated; thus, there was no reason to believe the exculpatory value of the ID card was apparent to police. Evidence that might as easily incriminate as exonerate the defendant is not "apparently exculpatory." Therefore, Hurst fails to meet the first prong of the ***Trombetta*** test.

¶19 Hurst contends that he satisfied the second prong of the ***Trombetta*** test. He argues that "[t]he ID card was of such a nature that [he] was unable to obtain comparable evidence by other reasonably available means." However, because Hurst has not satisfied the first prong, we do not address this argument. *See* ***Oinas***, 125 Wis. 2d at 491 ("We need not address the second criteria concerning the unavailability of comparable evidence. Both criteria must be satisfied in order to raise a claim resulting from negligent destruction of evidence.

The defendant has not satisfied the first test. On that basis alone, his argument fails.").

¶20 The ID card had an exculpatory value that was merely potentially useful to Hurst and, therefore, the ***Youngblood*** test governs. Hurst agreed at the sentencing hearing, and he does not otherwise dispute now, that there was no bad faith on the part of the police in failing to preserve the ID card. *See* ***Greenwold II***, 189 Wis. 2d at 68 ("[T]here is no bad faith when the police negligently fail to preserve evidence which is merely potentially exculpatory."). We agree that there is no evidence to support bad faith on behalf of the police in failing to preserve the ID card. Accordingly, even under a ***Youngblood*** analysis, there was no violation of Hurst's due process rights. The trial court correctly exercised its discretion to deny the motion for a mistrial, as well as the motion to dismiss.

¶21 For the reasons stated, the judgments are affirmed.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.