

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 2, 2011

A. John Voelker
Acting 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. 2010AP2582-CR

Cir. Ct. No. 2008CF1278

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTWON O. FIELDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Antwon Fields appeals a judgment convicting him of second-degree sexual assault of an unconscious person and second-degree sexual assault by intercourse without consent and by use or threat of force or

violence.¹ He also appeals an order denying his postconviction motion to vacate the convictions on the ground that the State failed to take pictures of text message he exchanged with the victim after the assault. He claims these messages were “apparently exculpatory,” and the police allowed these messages to be destroyed after merely transcribing some of them rather than taking pictures of them. Because we conclude that these messages were not “apparently exculpatory” and Fields could have accessed them through reasonably available alternate means, we affirm the judgment and order.

BACKGROUND

¶2 The victim testified that she and her cousin, Holly, visited the apartment of Andrea Priebe. The victim was sixteen years old at the time and Priebe was her boss and Fields’ girlfriend. The victim, Holly and Priebe drank together in the living room while Fields primarily stayed in the bedroom. After Holly went home, the victim went to the spare bedroom to sleep and “passed out” in her clothes.

¶3 The next thing the victim recalled was waking up with her pants and underwear taken off and seeing a man matching Fields’ height and build leaving the room. She testified that it felt like someone had intercourse with her. She then passed out again and woke up to find Fields on top of her having intercourse with her. After Fields left, she hid under the covers and sent several text messages to her cousin stating that Fields had raped her and she needed help. Fields entered

¹ Fields was also convicted of sexual intercourse with a child, but raises no issue on appeal regarding that charge.

the room and forced her to have intercourse a third time, after which the victim left the apartment and drove to her cousin's residence.

¶4 The victim and Fields also exchanged several text messages. The victim told Fields he could “get into big trouble” for what he did. Fields asked her to call him the next day, which she refused to do. Fields then sent several messages attempting to apologize, to which the victim did not respond.

¶5 Officer Jeffrey Lade testified that he transcribed all of the text messages on the victim's phone. He did not have a camera capable of taking photos that would allow the messages to be properly viewed afterwards. He testified that he transcribed “every single text message that was present in the phone between her and Mr. Fields.” A few weeks later, he once again acquired the phone to take photos of the texts, but no outgoing texts remained at that time.

¶6 Fields did not testify at trial, but through cross-examination and his counsel's argument suggested that the intercourse was consensual. At the postconviction hearing, he alleged for the first time that the victim had sent him several additional text messages that were not transcribed by Lade. He claimed that the victim asked if he was “still horny” and that she “promised” she would call him the next day. He testified that the victim seemed concerned about pregnancy because they had not used a condom and she was concerned about hurting Priebe's feelings. Lade testified at the postconviction hearing that none of the alleged additional texts were on the phone when he transcribed the texts and he would have transcribed them had they been there.

¶7 The alleged additional messages were not recovered from Fields' phone or from the service provider. Fields' phone was actually Priebe's property. The phone was passed among Fields' family members until after the trial when

Fields' sister-in-law eventually brought the phone to the public defender's office. No text messages were recovered from that phone. Fields did not identify the service provider for the phone or present any evidence regarding the service provider's policy on preserving text messages.

DISCUSSION

¶8 Destruction of “apparently exculpatory” evidence violates a defendant's due process rights if the defendant would be unable to obtain comparable evidence by other reasonably available means. *State v. Noble*, 2001 Wis App 145, ¶16, 246 Wis. 2d 533, 629 N.W.2d 317. Evidence is “apparently exculpatory” if its materiality rises above being potentially useful to clearly exculpatory. See *State v. Greenwold*, 189 Wis. 2d 59, 68, 525 N.W.2d 294 (Ct. App. 1994). A bald assertion that evidence would have shown something exculpatory does not make it “apparently exculpatory.” *Noble*, 246 Wis. 2d 533, ¶18.

¶9 The text messages Fields alleges in this case are not “apparently exculpatory” for several reasons. As in *Noble*, Lade testified that he wrote down all of the text messages that were on the victim's phone. Unlike in *State v. Huggett*, 2010 WI App 69, ¶23, 324 Wis. 2d 786, 783 N.W.2d 675, no tone or context was lost by Lade's transcription of the text messages rather than taking photographs of them.²

² In *State v. Huggett*, 2010 WI App 69, ¶23, 324 Wis. 2d 786, 783 N.W.2d 675, the police listened to a voicemail message on a cell phone and realized the evidentiary value of the messages because they were relevant to Huggett's claims of self defense. This court held that the police should have recorded the message for preservation because a mere description of the messages could not adequately convey the victim's tone.

¶10 In addition, Fields could have recovered this evidence through other reasonably available means. *See Noble*, 246 Wis. 2d 533, ¶16. Fields argued that these text messages could have existed in any of three locations: the victim's phone, his own phone, or the phone service provider. The evidence supports the trial court's finding that Lade transcribed all of the text messages that were in the victim's phone. At the time Lade transcribed the messages, there was no reason to believe any other messages existed or that Fields would be unable to recover them from the phone he used or the service provider. Unlike in *Huggett*, the State was not immediately alerted to the alleged additional text messages or their evidentiary value, and had no reason to believe that any material evidence was exclusively on the victim's phone. The State never had control over Fields' phone and cannot be faulted for Fields' failure to keep track of the phone he used and preserve the alleged exculpatory messages. Likewise, the State had no reason to contact or subpoena Fields' unidentified service provider. Fields did not claim the existence of the additional text messages until the postconviction hearing. The record shows no support for Fields' argument that the State allowed the destruction of apparently exculpatory evidence that was not reasonably available from other sources.

By the Court.—Judgment and order affirmed.

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

