

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Shane E. Ehr,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

October 13, 2022

Court of Appeals Case No.  
22A-CR-496

Appeal from the Jay Superior  
Court

The Honorable Gail Dues, Judge

Trial Court Cause No.  
38D01-2109-CM-180

**May, Judge.**

[1] Shane E. Ehr appeals following his conviction of Class A misdemeanor operating a vehicle while intoxicated endangering a person.<sup>1</sup> Ehr raises one issue on appeal, which we restate as whether the trial court erred when it denied his motion to dismiss after the State lost crime scene photographs. We affirm.

## Facts and Procedural History

[2] On September 24, 2021, Gerald Burkhalter hosted a party at his farmhouse near Bryant, Indiana. Approximately thirty-five people attended the party, and they spent the evening sitting around a campfire, drinking alcohol, and listening to live music. Ehr was walking around the party with a liquor bottle. He appeared to Burkhalter to be “having a good time dancing” at the party, but at one-point Ehr “dropped his pants and somebody asked him to pull them up, then he went over and sat down for a little while.” (Tr. Vol. II at 202.) Burkhalter also noticed Ehr “stumbling around” and trying to start a fight with one of Burkhalter’s friends, so Burkhalter suggested to Ehr that he “sleep it off” in his truck. (*Id.* at 203.) Burkhalter also offered to take Ehr to a mutual friend’s house, but Ehr remained at the party. Ehr continued to try to provoke a fight, and one of the people at the party shoved him to the ground. Ehr also pulled his shirt over his head and chanted incoherently. Eventually, Burkhalter directed Ehr to leave the party.

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<sup>1</sup> Ind. Code § 9-30-5-2(b).

[3] Ehr got into his truck and initially drove away from Burkhalter's house, but he turned around. He then revved his engine and accelerated as he drove back toward the crowd near Burkhalter's house. Burkhalter got into another vehicle to intercept Ehr before Ehr caused any damage, and Burkhalter rammed the vehicle into Ehr's truck. After the initial impact, Ehr continued to drive his truck toward the crowd, and Burkhalter rammed into Ehr's vehicle a second time. Burkhalter then pulled Ehr out of Ehr's truck, and several partygoers held Ehr on the ground until police arrived.

[4] Three deputies with the Jay County Sheriff's Office, including Deputy Travis Theurer and Sergeant Dereck Bogenschutz, and two Portland, Indiana, police officers arrived at the scene. Deputy Theurer noticed Ehr's breath smelled like alcohol. He also observed Ehr had bloodshot and watery eyes, slurred his speech, lacked coordination, and had "used the rest room, on himself." (Tr. Vol. III at 18.) Deputy Theurer arrested Ehr and transported him to the hospital for a blood draw. At the hospital, Ehr "would be calm at times and then become completely belligerent, . . . trying to rip the restraints off the bed, screaming and swearing at the nurses frequently." (*Id.* at 22.) The blood draw revealed Ehr's blood alcohol concentration was .251 g/100 ml.

[5] Back at the scene, Sergeant Bogenschutz used his department-issued cell phone to take photographs. The pictures depicted the location of each vehicle when he arrived on the scene. Sergeant Bogenschutz also took pictures of "[s]kid marks in the gravel, tire marks in the grass, and damage to the vehicles." (Tr. Vol. II at 38-39.) The next day he composed an officer report detailing his

response to the crash. In the report, Sergeant Bogenschutz wrote: “Pictures were taken of the area and included with this report.” (App. Vol. II at 15.)

[6] On September 28, 2021, the State charged Ehr with Class A misdemeanor operating while intoxicated endangering a person and Class B misdemeanor reckless driving.<sup>2</sup> The State later amended the charging information to include a charge for Class A misdemeanor operating a vehicle while intoxicated with a blood alcohol concentration of .15 or greater.<sup>3</sup> Sergeant Bogenschutz’s report was attached to the charging information, but the photographs referenced in the report were not filed with the charging information. The State also did not produce the photographs in discovery or in response to Ehr’s repeated requests.

[7] On December 28, 2021, the State informed Ehr it was unable to produce the photographs because it could not locate them. Later that day, Ehr filed a motion to dismiss that argued: “Due to the lack of the photographs that could provide a material fact aiding in [sic] the defense in this case, the Defendant respectfully requests that this case be dismissed.” (*Id.* at 50.) The trial court held a hearing on Ehr’s motion to dismiss on December 31, 2021. Sergeant Bogenschutz testified at the hearing that he did not currently have the photographs, and he was not sure what exactly happened to them. He explained that, while he thought he uploaded them to a department computer,

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<sup>2</sup> Ind. Code § 9-21-8-52.

<sup>3</sup> Ind. Code § 9-30-5-1(b).

he could not find the photographs on either his cell phone or the computer. Sergeant Bogenschutz denied intentionally destroying the photographs. He explained it was “relatively common” for errors to occur during the uploading process. (Tr. Vol. II at 43.) Ehr then argued the photographs were “very important” because they depicted the placement of the vehicles and “who hit who [sic] and when they hit who [sic].” (*Id.* at 45.) The State asserted the photographs were not exculpatory because they were taken after the crash and after Ehr was alleged to have ceased driving. Moreover, the State noted witnesses to the crash were available to testify about what they observed. The trial court then denied Ehr’s motion to dismiss.

[8] The trial court held a jury trial on March 3, 2022. The jury returned a verdict of guilty with respect to the two operating while intoxicated charges and not guilty of Class B misdemeanor reckless driving. The trial court entered judgment of conviction on only the Class A misdemeanor operating while intoxicated endangering a person count to avoid a double jeopardy violation and sentenced Ehr to an executed term of 270 days in jail.

## Discussion and Decision

[9] Ehr argues the trial court erred when it denied his motion to dismiss because the missing photographs were important to his defense and the State’s failure to preserve the photographs resulted in a denial of his right to due process. In pursuing a motion to dismiss, a defendant bears the burden of proving by a preponderance of the evidence all the facts necessary to support his motion.

*Ackerman v. State*, 51 N.E.3d 171, 177 (Ind. 2016), *cert. denied*, 137 S. Ct. 475 (2016). Where the defendant appeals from a negative judgment, we will reverse only if the evidence is without conflict and inescapably leads to the conclusion that the defendant is entitled to dismissal. *Id.* To determine whether the lost photographs resulted in a denial of Ehr’s right to due process, we must first determine whether the photographs were “materially exculpatory” or simply “potentially useful.” *Pimentel v. State*, 181 N.E.3d 474, 479 (Ind. Ct. App. 2022), *trans. denied*.

[10] “When the State fails to preserve materially exculpatory evidence, a due process violation occurs regardless of whether the State acted in bad faith.” *Id.* at 480. Evidence is exculpatory if it clears or tends to clear the defendant from alleged fault or guilt. *Id.* “Evidence is materially exculpatory if it ‘possesses an exculpatory value that was apparent before the evidence was destroyed’ and must ‘be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.’” *Id.* at 479 (quoting *Chissell v. State*, 705 N.E.2d 501, 504 (Ind. Ct. App. 1999), *trans. denied*).

[11] “On the other hand, evidence is merely potentially useful if ‘no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.’” *Id.* at 480 (quoting *Chissell*, 705 N.E.2d at 504.) The State’s failure to preserve potentially useful evidence does not violate a defendant’s right to due process unless the defendant can show the State acted in bad faith. *Id.* “Bad faith is defined as being not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of

dishonest purpose or moral obliquity.” *Blanchard v. State*, 802 N.E.2d 14, 27-28 (Ind. Ct. App. 2004) (internal quotation marks omitted).

[12] Sergeant Bogenschutz’s photographs were not materially exculpatory because they could not have cleared Ehr from guilt. They merely depicted the scene of the accident after Sergeant Bogenschutz arrived. Moreover, witnesses were available to testify regarding the scene and the positions of the vehicles in the aftermath of the crash. Thus, Ehr could obtain through witness testimony the same information the photographs conveyed. While the photographs might have proved potentially useful, Ehr failed to provide any evidence that they were lost as the result of bad faith. Sergeant Bogenschutz testified he attempted to upload the photographs to a department computer, but he could not find the photographs when he later tried to retrieve them. He denied intentionally destroying the photographs and explained it was not unusual for errors to occur during the uploading process. While the failure to ensure that evidentiary photographs are properly uploaded may be considered negligent, it is not evidence of conscious wrongdoing. Therefore, the trial court did not err in denying Ehr’s motion to dismiss. *See Bennett v. State*, 175 N.E.3d 331, 334-35 (Ind. Ct. App. 2021) (holding defendant was not denied due process when the State removed corrosion and buildup while cleaning a muzzleloader because the evidence was not materially exculpatory and the defendant made no showing the State acted in bad faith), *trans. denied*.

## Conclusion

[13] The trial court did not err when it denied Ehr's motion to dismiss because the lost photographs were not materially exculpatory. The photographs would not have cleared Ehr from guilt and witnesses were available to testify to what the photographs would have shown. While the photographs might have been potentially useful, Ehr made no showing the State destroyed them in bad faith. Consequently, we affirm the trial court.

[14] Affirmed.

Crone, J., and Weissmann, J., concur.