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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v THOMAS HERNANDEZ, Defendant-Appellant.	UNPUBLISHED November 13, 2026 10:55 AM No. 379215 Washtenaw Circuit Court LC No. 22-000534-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DUSTYN MICHAEL DURBIN, Defendant-Appellant.	No. 379261 Washtenaw Circuit Court LC Nos. 20-000503-FC; 22-000630-FH

Before: M. J. KELLY, P.J., and RIORDAN and RICK, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motions to dismiss.[1] For the reasons set forth in this opinion, we affirm the trial court but remand to that court for further proceedings regarding defendants' motion for reconsideration.

[1] In granting defendants' applications for leave to appeal, the appeals also were consolidated. *People v Hernandez*, unpublished order of the Court of Appeals, entered April 28, 2026 (Docket No. 379215); *People v Durbin*, unpublished order of the Court of Appeals, entered April 28, 2026 (Docket No. 379261).

I. FACTUAL AND PROCEDURAL HISTORY

Between 2014 and 2018, a series of sexual assaults occurred at Eastern Michigan University, and both defendants were charged as perpetrators. This interlocutory appeal arose when defense counsel[2] learned that Detective Jessica Lowery,[3] one of the detectives who interviewed the sexual-assault victims, intentionally deleted copies of the victims' videorecorded interviews pursuant to an alleged detective bureau policy.

During defendant Hernandez's preliminary examination, Detective Lowery was present as the officer in charge (OIC). Both of the victims testified that their interviews were not recorded. When questioned by the trial court regarding the existence of the recordings, the prosecutor stated, "I have indication from the officer that it was a Facetime video chat, which was not preserved and therefore there is no recording of it." Both defendants ultimately were bound over on all charges.

In September 2023, defense counsel received an e-mail from an assistant attorney general, stating:

> [Defense counsel], I believe you had asked Det. Lowry [sic] about whether she had any recorded interviews of the victims on this case? In talking to her about this, Det. Lowry [sic] clarified to me that they don't have any recordings of the victims, but that per Coppock's[4] policy at the time (when she was heading up the detective bureau), the victims are recorded for note-talking purposes (to write their reports), and afterwards, the recording themselves are not retained. Det. Lowry [sic] states that since she has taken over the bureau, she has since changed that policy and now retains victim interviews. But she does not have recordings of victim interviews here in our case. I wanted to make sure I passed this information along.

Defendants moved to dismiss shortly thereafter, arguing: "Evidence was not preserved, and we have gotten different stories. Multiple prosecutors have stated there was never a recording. Now the OIC says there was a recording that was not preserved. This matter should be dismissed or in the alternative scheduled for a *Brady* Hearing[5] and/or evidentiary hearing." The prosecution responded that the trial court should apply the *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988), test instead. The trial court issued an order concluding that "the burden is on Defendants to demonstrate at evidentiary hearing bad faith on the part of the police in the destruction of the recordings of the interviews with the complaining witnesses."

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[2] Defense counsel represented both defendants in the lower-court proceedings.

[3] At the time of the evidentiary hearing, Detective Lowery's last name was changed to Welker and her title changed to officer. For ease of reference, she will be referred to by Detective Lowery throughout this opinion.

[4] Detective Annette Coppock was Detective Lowery's supervisor when she began working at the detective bureau in 2018.

[5] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

In February 2025, the trial court held an evidentiary hearing addressing defendants' motions. Detective Lowery testified that the victims' statements at defendant Hernandez's preliminary examination were not inaccurate because "[i]t says it was not preserved, and therefore there are no recordings of it. They weren't preserved, so there were no recordings to give." She also testified, "The reason I deleted the recordings . . . was because that was the standard practice that I was trained on" and affirmed that the deletions were done intentionally. She also affirmed that "it was a policy of Annette Coppock to delete the [victim] interviews" and testified, "[Coppock's] expectation of practice in the way that I was trained, was yes, that if we did interviews of victims on domestic violence or sexual assault, that we were not to record them, but if we did, it was for notetaking purposes only."

The trial court subsequently issued its written opinion and order regarding defendants' motions, ruling as follows:

> Nothing before the Court supports a finding that the recordings of the statements would be helpful to defendants any more than the report generated from the recording. More importantly, the evidence did not establish that the potentially helpful evidence was destroyed in bad faith.
>
> Given that there is no indication that the recording was deleted in bad faith, for the purpose of destroying evidence for a forthcoming trial, or even with any thought about the impact on the defense whatsoever, the Court cannot find that Defendants have satisfied the *Youngblood* burden to establish a due process violation. Defendants' motion to dismiss must therefore be denied.

Defense counsel moved for reconsideration on behalf of both defendants, citing an article from the Ann Arbor Independent newspaper, which stated in part: "Annette Coppock, who is retired, when told of Lowry's [sic] claim [that the interviews were destroyed pursuant to Coppock's policy] said the accusation was 'total bullshit.' "[6] Defense counsel argued that "[i]f the statements of Coppock are true, that means that Jesica Lowry [sic] committed perjury. . . . If the statements of Coppock are not true, that displays police misconduct." The motion requested that the trial court grant the motion for reconsideration and "issue a material witness warrant should Annette Coppock evade service of process and can question her on this issue." The trial court summarily denied defendants' motion.

This appeal followed.[7]

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[6] The Ann Arbor Independent, *Sheriff Deputy's Sex Crimes Trial: Politics, Postponements And Missing Evidence* <http://a2independent.com/2024/04/16/sheriff-deputys-sex-crimes-trial-politics-postponements-and-missing-evidence> (accessed October 22, 2026).

[7] We note that, in a closely related case involving essentially the same facts, this Court denied leave to appeal regarding a third defendant's motion to dismiss under *Brady* and *Youngblood*. *People v McWilliams*, unpublished order of the Court of Appeals, entered November 17, 2025

II. STANDARD OF REVIEW

"We review a trial court's decision on a motion to dismiss charges against a defendant for an abuse of discretion." *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009) (citation modified). Findings of fact are reviewed for clear error. *People v Rodriguez*, 327 Mich App 573, 583; 935 NW2d 51 (2019). "A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that the trial court made a mistake." *People v Dillon*, 296 Mich App 506, 508; 822 NW2d 611 (2012). "[I]f resolution of a disputed factual question turns on the credibility of the witnesses or the weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate these matters." *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Generally, we review constitutional questions de novo. *People Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011). However, we review unpreserved issues for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Under the plain-error standard, the defendant must establish the following elements:

> First, there must be an error; second, the error must be plain (i.e., clear or obvious); and third, the error must affect substantial rights (i.e., there must be a showing that the error was outcome determinative). Moreover, reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of guilt or innocence. [*Id*. (internal citation omitted).]

III. MOTION TO DISMISS

" '[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' " *People v Chenault*, 495 Mich 142, 149; 845 NW2d 731 (2014), quoting *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963) (alteration added). "[T]he components of a 'true *Brady* violation,' are that: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *Chenault*, 495 Mich at 150 (citation omitted). "To establish materiality, a defendant must show that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

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(Docket No. 376585). On September 17, 2026, our Supreme Court denied leave to appeal as well. *People v McWilliams*, ___ Mich ___; 38 NW3d 861 (2026). JUSTICE WELCH concurred with the denial order, stating that she "cannot fault the trial court for declining to find that the [Ypsilanti Police Department] acted in bad faith on the record before it," but that "[i]n an appropriate case, I would be open to considering if, even in the absence of bad faith, the loss or destruction of evidence may violate a defendant's right to due process under Article 1, § 17 of the Michigan Constitution." *Id*. at 862-862 (WELCH, J., *concurring*).

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation marks and citation omitted).

"To warrant reversal on a claimed due-process violation involving the failure to preserve evidence, a defendant must prove that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith." *People v Dickinson*, 321 Mich App 1, 16; 909 NW2d 24 (2017) (quotation marks and citation omitted). That is, the defendant "bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *Id*. (quotation marks and citation omitted). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 US at 58.

Simply put, *Brady* applies when evidence is shown to be exculpatory, see *Chenault*, 495 Mich at 150-151, while *Youngblood* applies when evidence is not shown to be exculpatory but was destroyed in bad faith, see *Youngblood*, 488 US at 58. Further, when evidence is not shown to be exculpatory or destroyed in bad faith, neither *Brady* nor *Youngblood* warrant relief. See *Dickinson*, 321 Mich App at 16.

"[T]he routine destruction of taped police broadcasts, where the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). In *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454 n 9; 722 NW2d 254 (2006) (citations omitted), this Court declined to afford the defendant relief under *Youngblood*, reasoning that the "defendant failed to show that the police destroyed the videotape in bad faith. Our decision in this case would be different if defendant could show that the prosecution was engaged in gamesmanship or in a deliberate attempt to conceal evidence," but the "defendant makes no allegation of any such conduct on the part of law enforcement or the prosecution."

In the present case, the record supports the trial court's ruling. In an affidavit issued before the evidentiary hearing, Detective Lowery stated, "I was advised by Detective Coppock that she did not want us recording victim interviews on sexual assault cases or domestic violence cases, but if we did, they were to be used for note taking purposes only and then deleted." She further explained that "many of the complainants were recorded that I interviewed. They were recorded for note taking purposes and then deleted after the narratives were completed." At the evidentiary hearing, Detective Lowery testified consistently with her affidavit and did not present any testimony that the recordings contained any other information than the notes that were generated from the recordings. Therefore, the trial court did not err by concluding that *Brady* was inapplicable because the recordings were not shown to be exculpatory. Further, defendants have not actually identified for us any possible exculpatory statements in the interview notes, and the notes were consistent with the recordings. Consequently, the recordings could not have offered

any exculpatory value, or at least any independent exculpatory value, beyond the hypothetical exculpatory value of the notes themselves.[8]

Nonetheless, defendants argue that the trial court erred by applying the *Youngblood* test rather than the *Brady* test because the deleted interview recordings were "materially exculpatory." However, defendants present this argument in "conclusory fashion," *People v Beck*, 510 Mich 1, 26; 987 NW2d 1 (2022), stating only that the "[r]ecorded witness interviews constitute precisely that type of [material and exculpatory] evidence. The recordings themselves are the best evidence," without presenting any further legal or evidentiary authority to support this contention. "It is not enough for an appellant simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims and then search for authority either to sustain or reject his position." *Id.* (citation modified). Thus, we decline to hold that the recordings were exculpatory merely because they were "the best evidence" when compared to the notes derived therefrom.

Defendants further argue that any requirement for them to "demonstrate the exculpatory value of the destroyed recordings . . . improperly shifts the burden" because they are not required "to prove the precise contents of the [destroyed] evidence." We agree with defendants that they need not prove the "precise" contents of the evidence in question to be entitled to relief. However, *Brady* requires a defendant to show "that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Chenault*, 495 Mich at 151 (quotation marks and citation omitted). Thus, defendants bear the burden to at least show some general details of the destroyed evidence so the court has a basis to decide that relief is warranted. See *id*. Defendants have not done so here. Consequently, the trial court did not err by concluding that *Brady*, which concerns exculpatory evidence, does not apply in this case. See *id*. at 150-151.

Defendants next argue that, even if the *Youngblood* test is the correct standard, the record supports a finding of bad faith because the existence of the interview recordings or of their intentional destruction was not initially disclosed. We are not persuaded by this argument.

Detective Lowery stated in her affidavit that "up until the time that [defense counsel] asked me if the interviews in these cases had ever been recorded, this was never discussed specifically with me," and that the interviews for the victims related to defendant Hernandez's charges "were done on facetime [sic] rather than interview room at Ypsilanti [Police Department], which would have presented a separate preservation process." Therefore, at defendant Hernandez's preliminary hearing she advised that there were no recordings to produce. Defendants, who bear the burden of showing the existence of bad faith, see *Dickinson*, 321 Mich App at 16, failed to demonstrate that Detective Lowery or the prosecution made any "deliberate attempt[s] to conceal evidence." See *Greenfield*, 217 Mich App at 454 n 9. The record supports the finding that Detective Lowery's

[8] Even if we assume that the recordings had exculpatory value, it is doubtful that defendants could show *Brady* "materiality," i.e., prejudice, from the deletion of the recordings for the simple reason that the record indicates that the notes and recordings were consistent. See *Chenault*, 495 Mich at 150. However, in light of our conclusion that the recordings were not exculpatory, it is unnecessary to reach that question.

deletion of the recordings was "routine," see *Johnson*, 197 Mich App at 365, and done pursuant to policy, rather than as an intentional action to deprive defendants of favorable evidence. Accordingly, defendants are not entitled to reversal in this regard.[9]

IV. MOTION FOR RECONSIDERATION

Finally, defendants assert that they will suffer "substantial harm" under MCR 7.205(B)(1) without the ability to question Detective Coppock before trial. Defendants only raised this issue in their motion for reconsideration, and generally, "[a]n issue is not preserved if it is raised for the first time in a motion for reconsideration." *People v Swenor*, 336 Mich App 550, 562; 971 NW2d 33 (2021). However, according to the record before us, the trial court did not present any findings when ruling on the motion, stating in its order only that the motion was denied "[f]or the reasons stated on the record . . . ." Nothing in the record indicates that a hearing was held on defendants' motion for reconsideration. Accordingly, a remand to the trial court is necessary for that court to, at a minimum, present its findings regarding its decision on defendants' motion for reconsideration.[10]

V. CONCLUSION

We affirm the trial court but remand to that court for further proceedings regarding defendants' motion for reconsideration. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Michael J. Riordan
/s/ Michelle M. Rick

[9] While a denial of leave to appeal is "not to be regarded as precedent," MCR 7.301(E)(4), we note that our decision affirming the trial court is consistent with our Supreme Court's resolution of the related case discussed in footnote seven, *supra*.

[10] We note that the particular origin of the deletion policy seems to be ancillary to the question of whether the deletion of the recordings in this case was performed in bad faith. However, under the circumstances of this case, we believe that some further articulation by the trial court of its rationale is warranted, or perhaps further evidentiary proceedings in the trial court's discretion.