**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 26, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP1274-CR** **Cir. Ct. No. 2009CF429**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THEODORE V. ECKSTEIN,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Theodore V. Eckstein appeals from a judgment convicting him of homicide by intoxicated use of a motor vehicle and from an order denying his motion for postconviction relief. We affirm.

¶2 Eckstein and Michael Janasik were in a one-car crash in Eckstein's car. Janasik died. A highly intoxicated Eckstein claimed he did not recall being in the car. His theory of defense was that Janasik was the driver. His first trial ended in a hung jury. A second jury found him guilty. Eckstein filed a postconviction motion alleging that the State destroyed apparently exculpatory evidence, his trial counsel was ineffective, and the cumulative effect of the errors were sufficiently prejudicial to warrant a new trial. The motion was denied. Eckstein appeals.

¶3 Eckstein first argues that his right to due process was violated because the State did not test the ignition key for fingerprints at all before the first trial and then, before the second, tested it first for DNA, making a subsequent test for latent prints impossible. There was expert testimony that it would have been possible to test the key first for fingerprints and then for DNA.

¶4 Eckstein can establish a due process violation in one of two ways. He may show that the fingerprint evidence either had exculpatory value apparent before it was lost or that it merely was potentially exculpatory but that the police acted in bad faith in failing to preserve it. *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67-68, 525 N.W.2d 294 (Ct. App. 1994) (citing ***Arizona v. Youngblood***, 488 U.S. 51, 57-58 (1988)). Evidence is apparently exculpatory when its exculpatory nature was apparent before it was destroyed or lost and it is of such a nature that the defendant cannot obtain comparable evidence by other reasonable means. ***State v. Munford***, 2010 WI App 168, ¶21, 330 Wis. 2d 575, 794 N.W.2d 264. Evidence is potentially exculpatory when "no more can be said" of its value at the time it was not preserved than that it might be useful to establish innocence. *See* ***Illinois v. Fisher***, 540 U.S. 544, 548 (2004). Either way, the burden is Eckstein's. *See* ***Munford***, 330 Wis. 2d 575, ¶21, and ***Greenwold***, 189 Wis. 2d at 69-70. Whether a due process violation has occurred presents a question of constitutional

fact. *See* ***Greenwold***, 189 Wis. 2d at 66. We review the underlying historical facts under the clearly erroneous standard but review questions of ultimate constitutional fact independently. ***State v. Harris***, 2004 WI 64, ¶11, 272 Wis. 2d 80, 680 N.W.2d 737.

¶5 A State Crime Laboratory fingerprint examiner testified at the postconviction hearing that, while possible, it was "hard to say" whether turning a key in the ignition would leave a fingerprint on the key and, while some ridge detail was a possibility, it would surprise him to find a latent print of value. He estimated a ten percent chance of obtaining a suitable latent print off the checkerboard pattern on the key and that the chances of getting DNA from it probably were "a lot better" than getting a viable fingerprint.

¶6 A State Crime Laboratory forensic scientist testified that Eckstein was the sole source of DNA on the steering wheel cover and one of multiple contributors on the gear shift handle; Janasik was excluded from that mixture. An FBI Laboratory forensic examiner testified that hair fibers found on glass on the passenger side of the car were microscopically consistent with Janasik's.

¶7 The trial court found that the evidence showed that a print was only possible, not probable, that investigators attempted to use the best means to determine the driver, that performing the DNA analysis first perhaps was a misunderstanding, that Eckstein came running up to one of the friends with whom he had been partying less than a half hour before the accident, saying "he had flipped the car" but did not want them to call 911 and, when they did, he said "I was never here," and ran off and hid, and that, in a recorded jail telephone call with his mother, he did not deny driving when his mother said, "Now, you and me and everyone else alive on this earth know you were driving." The court found

other witnesses' testimony more credible than Eckstein's. It is for the trial court to determine witness credibility. ***State v. Stockman***, 46 Wis. 2d 243, 247, 174 N.W.2d 249 (1970). We agree that Eckstein failed to demonstrate that fingerprint evidence had apparent exculpatory value.

¶8 Eckstein highlights that the detective who took the ignition key from Eckstein's car after the accident did not have it analyzed for fingerprints because the detective said "[i]t slipped [his] mind," that the State did not send the key for DNA analysis until before the second trial, that the analysis yielded no DNA, and that when he sought to have the key tested for fingerprints postconviction, he learned that the DNA analysis likely destroyed any fingerprints on the key.

¶9 Unless a defendant can show bad faith on the part of the police, even negligent failure to preserve merely potentially useful evidence does not constitute a denial of due process. ***Youngblood***, 488 U.S. at 58. The trial court found no evidence of bad faith. The detective testified that he believed it was more likely that a DNA profile could be developed from the key because, in his experience, it is difficult to get fingerprints from keys due to their texture. Eckstein argues that testing the key for prints was "logical and necessary for a reliable outcome," but due process is not violated when police fail to use a particular investigatory tool. ***Id.*** at 58-59. The fingerprint evidence was "simply an avenue of investigation that might have led in any number of directions." ***Youngblood***, 488 U.S. at 56 n.*.

¶10 Eckstein next asserts that his trial counsel was constitutionally ineffective for inadequately investigating before the second trial and inadequately objecting at it. To prove an ineffective assistance of counsel claim, a defendant must show that trial counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may

dispose of an ineffectiveness claim if either ground is not proved. ***Id.*** at 697. We review the denial of such a claim as a mixed question of fact and law, upholding the trial court's factual findings unless clearly erroneous and independently reviewing as a question of law the two-pronged test of counsel's performance. ***State v. Johnson***, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990).

¶11 Eckstein's counsel testified at the postconviction motion hearing that he thought it would be "stupid" to have the key tested for fingerprints. One reason was that "we knew that he had touched the key"; a second was that the key fob bore the slogan, "If I'm not wasted, the day is." Trial strategy decisions reasonably based in law and fact generally do not constitute ineffective assistance of counsel. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). Considering that Eckstein claims not to remember being in the car, his assertion that he "has been prejudiced by [counsel's] inaction" is puzzling, as the test might have proved he was the driver.

¶12 Eckstein next complains that defense counsel was ineffective for the "catastrophic" use of its accident reconstruction expert. He faults counsel for the expert's testimony that he was retained to see if he could conclude that Eckstein was not the driver and for being unaware that the expert's analysis appeared contrived, inaccurate, and result-oriented. Counsel testified, however, that the expert "dragg[ed] his feet" in supplying the reconstruction data. Eckstein does not say what counsel should have done differently or explain how, if at all, he was prejudiced by the expert's testimony or counsel's strategy. A motion alleging ineffective assistance of counsel may not be based on speculation. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

¶13 Eckstein also criticizes counsel for not calling as witnesses friends Eckstein said would testify that he often allowed them to drive his car, even when he was in the car. Counsel testified that he thought that avenue "silly … because there were witnesses that saw [Eckstein] get into the vehicle and drive away" on the night of the accident. The trial court found that because others sometimes drove his car did not prove that Janasik drove it that night and, indeed, their testimony could have harmed Eckstein. They testified at the postconviction hearing that Eckstein had no license, which would have opened the door to questioning about his prior offenses. Counsel's strategy was reasonable.

¶14 Lastly, Eckstein asserts that counsel ineffectively failed to adequately object to the State's "interposing" and asserting facts not in evidence. We need not discuss the examples Eckstein offers from the first trial because they could have had no bearing on his conviction after the second. The other example involves the State's cross-examination of the defense's accident reconstruction expert. Even accepting for argument's sake that the State crossed the line, the trial court found that it did not interfere with proper evidence getting to the jury, that the jury was not misled, and that the other evidence was "substantial" such that the outcome of the trial would not have been different. These findings are not clearly erroneous, and we agree with the trial court's legal conclusions. Furthermore, counsel moved for a mistrial. Its denial cannot be laid at his feet.

*By the Court.*—Judgment and order affirmed.

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