COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0054-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL A. TETZNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Randall Tetzner appeals his conviction for second-degree reckless endangering safety with a dangerous weapon, having pleaded no contest to the charge. The complaint alleged that Tetzner opened fire on two men in their truck with a semi-automatic rifle equipped with a fifteen-round magazine. Police found five spent casings on the ground and the rifle in Tetzner's home with

ten live rounds remaining. They also found a bullet fragment in the victims' truck. Tetzner told police that he thought the victims were trying to steal his own truck and were going to shoot him. The owner of the damaged truck had it repaired before trial, eradicating the damage caused by the shooting. Tetzner argues that these repairs destroyed exculpatory evidence in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963), and ***Arizona v. Youngblood***, 488 U.S. 51 (1988), and also ran afoul of the discovery statutes. *See* § 971.23(1), STATS. Tetzner argues that this loss of exculpatory evidence required suppression of inculpatory evidence stemming from the shooting, including photographs and a bullet fragment recovered by the police. We reject these arguments and therefore affirm the conviction.

None of Tetzner's claims are meritorious. First, Tetzner has shown no ***Brady*** violation. Under ***Brady***, Tetzner needed to make a threshold showing that the truck had contained exculpatory evidence. Tetzner made none. In fact, the surviving evidence suggests otherwise. The prosecution kept the bullet fragment from the truck, Tetzner admitted shooting at the truck, and it sustained two flat tires. Beyond that, the prosecution did not have possession of the truck at the time of the repairs. The prosecution had no ***Brady*** duty on evidence over which it lacked exclusive possession. *See* ***State v. Armstrong***, 110 Wis.2d 555, 580, 329 N.W.2d 386, 398 (1983). Second, Tetzner has shown no violation of the discovery statute. The statute operates like the ***Brady*** doctrine. By its plain language, it applies only to evidence "in the possession, custody or control of the state." *See* § 971.23(1), STATS. Again, the prosecution did not possess or otherwise control the truck. Third, Tetzner has shown no ***Youngblood*** violation. ***Youngblood*** requires a showing of prosecutorial bad faith. *See* ***Youngblood***, 488 U.S. at 58. Tetzner, however, has no proof that the prosecution knew the truck

contained or constituted exculpatory evidence or that the prosecution intended to destroy such evidence. As noted above, the surviving evidence suggests otherwise, and Tetzner had access to that evidence. Last, we see nothing in ***State v. Maday***, 179 Wis.2d 346, 507 N.W.2d 365 (Ct. App. 1993), cited by Tetzner for general due process principles, that requires a different result; Tetzner has shown no violation of basic justice or his fundamental rights from the loss of the evidence. In short, Tetzner has given no basis to reverse his conviction.

By the Court.—Judgment affirmed.

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