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2011 IL App (3d) 090846-U

Order filed July 27, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14 th Judicial Circuit, Mercer County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-09-0846
RYAN SPENCER ROSS BELL,)	Circuit No. 06-CF-40
Defendant-Appellant.)	Honorable James G. Conway, Jr., Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Wright and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Although the State failed to disclose evidence to the defendant, the evidence was not material and did not prejudice the defendant's sentencing.

¶ 2 The defendant, Ryan Spencer Ross Bell, pled guilty to one count of criminal sexual assault (720 ILCS 5/12--13(a)(2) (West 2006)). After sentencing, he filed a postconviction petition alleging that the State violated his due process rights under *Brady v. Maryland*, 373 U.S.

83 (1963). Following a hearing, the trial court denied the defendant's petition. The defendant appeals the denial of his postconviction petition. We affirm.

¶ 3

FACTS

¶ 4 On May 25, 2006, the State charged the defendant, by amended information, with three counts of criminal sexual assault (720 ILCS 5/12--13(a)(2) (West 2006)), two counts of criminal sexual assault by accountability (720 ILCS 5/5--2(c), 12--13(a)(2) (West 2006)), and two counts of battery (720 ILCS 5/12--3(a)(2) (West 2006)). The State alleged that, on or about May 13, 2006, the defendant: (1) put his penis inside the victim's vagina, knowing that the victim was unable to give knowing consent; (2) inserted two different objects into the victim's vagina, knowing that the victim was unable to give knowing consent; (3) held down the victim's shoulders while two other males put their penises inside the victim's vagina; (4) slapped the victim in the face; and (5) urinated on the victim's face.

¶ 5 On October 24, 2006, the defendant pled guilty to one count of criminal sexual assault (720 ILCS 5/12--13(a)(2) (West 2006)), which alleged that the defendant put his penis inside the vagina of the victim, knowing that the victim was unable to give knowing consent. In exchange for the defendant's guilty plea, the State dismissed all of the other charges.

¶ 6 The State's factual basis included summaries of the statements several witnesses would have testified to had the case gone to trial. The victim would have testified that the defendant and another male picked her up and drove her to a party at his apartment on the night of May 13, 2006. While en route, the trio picked up another female. The defendant also provided the victim with alcoholic drinks while she was in his car. Upon arrival, the victim was unable to walk, and the defendant carried her into his bedroom. The defendant then "threw her on the bed" and

"started to take her clothes off."

¶ 7 The State told the court that several other witnesses would testify that they saw the defendant place his penis inside the victim's vagina. After the defendant finished having sex with the victim, they observed a second male attempt to have sex with her, but fail to complete the act. A third male then had sex with the victim. One of the witnesses would testify that he heard the victim scream "stop it hurts" while the defendant was having sex with her.

¶ 8 After the third male got off of the bed, witnesses watched the victim stumble out of the defendant's bedroom. Unable to walk more than a few steps, she eventually fell on the kitchen floor. The defendant was then observed taking a hot dog out of the refrigerator and touching it to the victim's vagina. He next inserted a soda bottle into the victim's vagina and urinated on her as she lay on the floor. After these incidents, the defendant and another male took the victim home.

¶ 9 The trial court then asked the defendant's trial counsel if the State's proffer was substantially correct. Trial counsel said yes. The trial court posed the same question to the defendant, who also said yes. The trial court then accepted the defendant's plea. Later, the defendant was sentenced to an extended 20-year prison term.

¶ 10 Prior to the defendant's guilty plea and sentencing, the State made seven evidentiary disclosures. The State's first disclosure noted that "[a]ny written or recorded statements and the substance of any oral statements made by the accused *** are included in the discovery materials provided in paragraph (1) above." Paragraph (1) provided the names and known addresses of the witnesses and relevant reports that the State might use at trial. The State included with its disclosure the police reports summarizing the recorded interviews conducted with the victim, a codefendant, and the defendant's neighbor. However, the disclosures did not specifically indicate

that the State possessed a videotaped and audiotaped interview with the victim and audiotaped interviews with two other witnesses. The State's six supplemental disclosures also did not reference the tapes.

¶ 11 The police reports in the State's disclosures noted that the interview with the victim was a forensic interview. The report did not disclose that the victim said she saw a doctor approximately six days after the alleged sexual assault and that she suffered "scratches and bruises down there" as a result of the incident. However, the victim later stated on the video recording that her medical examination was "good" and "everything was normal." The police did not investigate the results of the victim's medical exam.

¶ 12 Additionally, the disclosed police reports did not establish that the interviews with the codefendant and the defendant's neighbor were recorded. These two interviews provided varying interpretations of the alleged sexual assault. The codefendant told the interviewing officer that the victim consented to having sex with him and that she took her own clothes off. He also stated that the victim was hesitant at first, saying " 'I don't know about this[,] ' " but then consented. The defendant's neighbor told police that after the incident, the defendant told him that he "did not have sex at all with [the victim], he was just holding [the victim's] hand[.]" The neighbor did not believe the defendant and thought that he was "doing stuff with [the victim]," but he was not sure. The defendant did not learn of these audiotaped statements until after he had pled guilty and was sentenced.

¶ 13 On March 1, 2007, new counsel for the defendant filed a motion to withdraw the defendant's guilty plea. The trial court denied the defendant's motion, and the defendant appealed. We affirmed the trial court's findings. *People v. Bell*, No. 3--07--0602 (2008)

(unpublished order under Supreme Court Rule 23).

¶ 14 The defendant filed a postconviction petition on October 23, 2008. The defendant's petition alleged that he was denied due process of law under *Brady*, 373 U.S. 83, because the State had not disclosed the videotaped and audiotaped interview with the victim and the audiotaped interviews with the codefendant and the defendant's neighbor.

¶ 15 At the petition hearing, the State argued that it made the tapes available to the defendant through its open-file policy. This policy purportedly provided the defendant's trial counsel with access to the tapes if he requested to view them. Further, the State's Attorney told the trial court that he had a conversation with defense counsel about the tapes. Defense counsel testified that he never conversed with the State's Attorney about the existence of the tapes. Nevertheless, the State's Attorney said that defense counsel should have been aware of them because he was an "[e]xperienced criminal defense counsel in Rock Island and Mercer Counties" and was "aware that forensic interviews [were] taped." As a result, the State's Attorney alleged, the tapes were available to defense counsel, and defense counsel made a strategic decision not to view them.

¶ 16 Following the petition hearing, the trial court denied the defendant's postconviction petition. In its written order, it found that there was "substantial evidence that [d]efendant and his then counsel, knew or should have known of the existence of the subject audio and videotapes." The trial court concluded that even if the defendant had the tapes, "it [was] not so reasonably probable that he would have obtained a different (better) result" and "he likely would have gotten the exact same sentence." Consequently, the defendant had not established a *Brady* violation. The defendant appeals.

¶ 17

ANALYSIS

¶ 18 The defendant argues that the trial court erred in denying his postconviction petition. He alleges that the State withheld a videotape and audiotape of an interview with the victim and audiotaped interviews with the codefendant and the defendant's neighbor. See *Brady*, 373 U.S. 83.

¶ 19 We review a third-stage postconviction petition that raises a *Brady* violation for manifest error. *People v. Morgan*, 212 Ill. 2d 148 (2004). "Manifest error is error which is clearly evident, plain, and indisputable." (Internal quotation marks omitted.) *Id.* at 155 (quoting *People v. Johnson*, 206 Ill. 2d 348 (2002)) (quoting *People v. Ruiz*, 177 Ill. 2d 368 (1997)).

¶ 20 To establish a *Brady* violation, a defendant must show: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). Favorable evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¶ 21 The Illinois Supreme Court codified the *Brady* disclosure requirement in Illinois Supreme Court Rule 412 (eff. March 1, 2001). Supreme Court Rule 412 requires "full discovery to the end that the truth may be ascertained." *People v. Parton*, 40 Ill. App. 3d 753, 757 (1976). Where the State chooses to satisfy its disclosure burden with an open-file policy, it must still " 'describe in general terms' the documents to be inspected[.]" *Id.* (quoting Ill. S. Ct. R. 412(e)(i) (eff. March 1, 2001)).

¶ 22 In the present case, the defendant argues that the State withheld evidence from his trial counsel. The defendant alleges that the videotaped and audiotaped statements were favorable and material to his sentencing hearing. In particular, there was evidence that the victim had a medical exam six days after the incident that yielded negative results. If the defendant knew of this exam, he argues that he could have used the results to show that force was not used. Additionally, the two audiotaped witness interviews provided mitigating evidence. The two witnesses provided differing descriptions of the incident, and neither indicated that the defendant had sexually assaulted the victim. The defendant contends that if this evidence was known to him before sentencing, he would have used it to mitigate the length of his sentence.

¶ 23 We first examine the State's disclosure practices for willful or inadvertent suppression of evidence. We note that the State's use of an open-file policy is good practice. See *People v. Walton*, 376 Ill. App. 3d 149 (2007). However, the disclosures associated with this policy failed to "describe in general terms" the videotaped and audiotaped interviews that it had in its possession, as required by Illinois Supreme Court Rule 412(e)(i) (eff. March 1, 2001). Rather, the State's disclosures made only general references to the victim and witnesses appearing on these recordings and included police reports summarizing their respective interviews. The only mention of the victim's videotaped interview was from the police report notation that it was a forensic interview. The audiotaped interviews were not mentioned in the police report.

¶ 24 We also note that the trial court's reliance on defense counsel's implied notice of the videotaped interview is misplaced. Such a practice could unfairly prejudice accused defendants who are represented by attorneys with little experience trying sexual assault cases in Mercer and Rock Island counties. This ruling would require different disclosures based on the practice area

and experience of the defense counsel. Such a result is contrary to the "full discovery" intent of *Brady* and Supreme Court Rule 412. See *Parton*, 40 Ill. App. 3d at 757 (encouraging specific types of disclosure and nondisclosure will reach a point where no attorney will know what may or should be discoverable).

¶ 25 Nevertheless, we find that the State's failure to disclose the taped interviews did not prejudice the defendant. The evidence on these recordings might have been favorable to the defendant's sentencing, but he did not establish that it was material. Materiality is dependent on a showing that the evidence would have "put the whole case in such a different light as to undermine confidence in the verdict" (Internal quotation marks omitted.) *Beaman*, 229 Ill. 2d at 74 (quoting *People v. Coleman*, 183 Ill. 2d 366, 393 (1998)). In this case, the nondisclosure of the statements did not undermine our confidence in the trial court's sentencing.

¶ 26 The defendant contends that the evidence from the victim's negative medical exam results and statements from the two witnesses would have provided mitigating evidence at his sentencing hearing. However, this evidence does not point to a different sentencing result when compared with the weight of the evidence against the defendant. In particular, the victim stated in her interview that she suffered scratches and bruises, but she had a "good" medical exam. However, this exam was conducted six days after the incident, providing time for her injuries to heal. Furthermore, the codefendant's and neighbor's favorable recollections of the incident would have provided little mitigation when contrasted with the statements of six other witnesses who corroborated the victim's story of the sexual assault. Therefore, we find that the trial court's decision was not manifestly erroneous.

¶ 27

CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Mercer County is affirmed.

¶ 29 Affirmed.