2018 IL App (2d) 160448-U
No. 2-16-0448
Order filed August 3, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MILTON T. BERRIOS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 15-CM-2177 Honorable Kathryn D. Karayannis, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The State did not violate *Brady* by revealing only during its opening statement that the complainant had recanted, as under the circumstances there was no reasonable probability that a pretrial disclosure would have produced a different result.

¶ 2 Following a jury trial in the circuit court of Kane County, defendant, Milton T. Berrios, was found guilty of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2014)). Defendant argues on appeal that the trial court erred in denying his motion for a mistrial. Defendant sought a mistrial on the basis that the State failed to comply with its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). We affirm.

¶ 3 During the State's opening statement, the prosecutor stated:

> "I'm not spoiling anything when I tell you that the evidence in this case is going to show that the victim doesn't want to get up here and testify against the father of her kids today. This isn't going to be a case where the victim takes the stand and confronts her abuser. *** In fact, I don't know what the heck the victim is going to say when she gets on the stand today ***."

Defense counsel presented an opening statement in which she asserted that defendant and the victim, Anastasia M., engaged in a verbal argument and that there was no physical altercation. Immediately after finishing her opening statement, defense counsel moved for a mistrial, arguing that the State's opening statement suggested that Anastasia had made an exculpatory statement that had not been disclosed to the defense. The prosecutor responded that, in a telephone conversation the day before trial, Anastasia had told him that defendant had not struck her. Anastasia told the prosecutor that defendant's physical contact with her was accidental.

¶ 4 In ruling on defense counsel's motion, the trial court stated, "the question here is whether this will prevent a fair trial." The court determined that the State's failure to disclose Anastasia's statement was not intentional, and that defense counsel had ample opportunity to interview Anastasia. The court denied defendant's motion for a mistrial, but offered the defense additional time to interview Anastasia. Defense counsel accepted the offer, and the court instructed defense counsel to "[c]heck back with [the court] in ten minutes."

¶ 5 At trial, Anastasia testified for the State that defendant was living with her on June 18, 2015, as were her two children aged 1 and 10. Defendant was the younger child's father. Defendant was missing part of his left leg and he wore a prosthetic. Anastasia testified that she remembered very little about what occurred on June 18, 2015. She recalled that at 3 a.m. she was

sleeping. Defendant woke her up and they started arguing about messages on her phone. Anastasia went outside to the porch to smoke a cigarette. Defendant, who was not wearing his prosthetic leg at the time, hopped after her. Anastasia went back in the house and defendant followed her. Anastasia testified, "He tripped over something or I don't know what, but it made me fall." Anastasia acknowledged that she did not see defendant trip. After Anastasia got up, she and defendant continued arguing. Anastasia testified that she was scared and she called the police. Anastasia remembered speaking with the police, but she did not recall what she told them. Anastasia acknowledged that she prepared and signed a handwritten statement stating, in pertinent part, as follows:

> "I was woken out of my sleep by [defendant] accusing me of talking to another man. He continued to yell and scream at me ***—argument continued ***—on into the living room where he then put his hands on my neck. ***
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> ***
>
> My lip was cut trying to get him off of me."

¶ 6 Anastasia acknowledged calling 911. A recording of the call was admitted into evidence and played for the jury. During the call, Anastasia indicated that someone was trying to choke and hit her.

¶ 7 Aurora police officer Eric Rappa testified that he had been with the Aurora Police Department since December 22, 2014. On June 18, 2015, Rappa was dispatched to Anastasia's home in response to a report of a domestic battery. Officer Ryan Tinsley was Rappa's partner. They went inside Anastasia's home and Rappa spoke with both Anastasia and defendant. Tinsley and another officer were present during the conversation with defendant. Defendant indicated that he found several text messages from another man on Anastasia's cell phone. Defendant

woke Anastasia up and confronted her about the text messages and they started to argue. Defendant denied having any physical contact with Anastasia. After speaking with Rappa, defendant was placed under arrest.

¶ 8 When Rappa spoke with Anastasia, he noticed redness around her neck and a small laceration under her upper lip. Rappa photographed Anastasia's injuries. The photographs were admitted into evidence and shown to the jury. On cross-examination, Rappa testified that he was still in training on the date of the incident. He acknowledged that his vehicle was equipped with a system to record audio and video, but he did not record his conversation with Anastasia. Rappa gave Anastasia the opportunity to prepare a written statement. He did not give the same opportunity to defendant. Rappa's report did not mention that defendant was missing part of his leg.

¶ 9 Tinsley testified that, on June 18, 2015, he was Rappa's field training officer. According to Tinsley, Anastasia was visibly distraught when he and Rappa encountered her. Anastasia was disheveled, and there was "some redness" on her neck. Tinsley's testimony corroborated Rappa's account of his conversation with defendant.

¶ 10 Defendant testified that in the early morning hours of June 18, 2015, while he and Anastasia were in bed, Anastasia's phone kept "going off." Defendant asked Anastasia why some man was texting her. Anastasia got up and walked away. The two then began to argue. Defendant, who was not wearing his prosthetic leg, hopped after Anastasia into the living room. Defendant stepped on something on the floor—possibly a Lego. Defendant reached out so that he would not fall. He made contact with Anastasia, and they both fell. Afterward, they continued to argue, and Anastasia called 911. Defendant denied that he ever punched, kicked, or otherwise tried to hurt Anastasia.

¶ 11 Defendant argues that, in violation of *Brady*, the prosecution suppressed exculpatory evidence—Anastasia's pretrial statement to the prosecutor that the physical contact between defendant and her was accidental. In *Brady*, the United States Supreme Court held that "the 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." *Brady*, 373 at 87. "[E]vidence 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.' " *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

¶ 12 We review the trial court's ruling on a *Brady* claim for manifest error. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). Manifest error will be found where the error is clearly evident, plain, and indisputable. *Id*.

¶ 13 Significantly, the exculpatory evidence withheld by the prosecution in *Brady* did not come to the defendant's attention "until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed." *Brady*, 373 U.S. at 84. Here, in contrast, defendant became aware of the exculpatory evidence very early in his trial. There is ample authority that *Brady* does not always require pretrial disclosure of exculpatory evidence. *Gill v. City of Milwaukee*, 850 F.3d 335, 343 (7th Cir. 2017) ("Our cases *** have consistently held that *Brady* does not require the disclosure of favorable evidence prior to trial."); *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir. 2005) ("Under the rule in our circuit *Brady* does not require pretrial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial."); *United States v. Rogers*, 960 F.2d 1501, 1510 (10th Cir. 1992) ("The *Brady* rule is not violated when the material requested is made available during

trial."); *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988) ("*Brady* does not necessarily require that the prosecution turn over exculpatory material *before* trial.") (Emphasis in original.); *United States v. Ramirez*, 810 F.2d 1338, 1343 (5th Cir. 1987) ("[T]here is no requirement of pre-trial disclosure of *Brady* material."); *United States v. Word*, 806 F.2d 658, 665 (6th Cir. 1986) ("If previously undisclosed evidence is disclosed *** during trial, no *Brady* violation occurs unless the defendant has been prejudiced by the delay in disclosure."); *U.S. ex rel. Lucas v. Regan*, 503 F.2d 1, 3 n.1 (2d Cir. 1974) ("Neither *Brady* nor any other case we know of requires that disclosures under *Brady* must be made before trial.").

¶ 14 What *Brady* requires is that exculpatory information be disclosed " 'no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made.' [Citation.]" *United States v. Ulbricht*, 858 F.3d 71, 112 (2d Cir. 2017); see also *Gill*, 850 F.3d at 343 (quoting *United States v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001)) (" '*Brady* does not require pretrial disclosure' and demands only that disclosure come with enough time for a defendant to make use of the evidence."). Here, there is no reasonable probability that earlier disclosure that Anastasia had changed her story would have resulted in a not-guilty verdict.

¶ 15 This was not a complicated case. Because Anastasia retracted the account of events in her written statement and her 911 call, the State relied on the statement and the 911 call (1) to impeach Anastasia's testimony and (2) as substantive evidence of defendant's guilt. Defendant argues that, had the exculpatory evidence been disclosed earlier, his attorney could have raised a different defense theory in her opening statement. According to defendant, his attorney could have argued that Anastasia's testimony would show that any physical contact between defendant and Anastasia was accidental. However, that quickly became evident when Anastasia testified

for the State. There is not a reasonable probability that mention of this in defendant's opening statement would have led to his acquittal.

¶ 16 Defendant further contends that "[w]ithout the time to look into [Anastasia's] statement no potential witnesses or evidence that may be investigated based upon the statement are lost to [defendant] and can not [*sic*] be properly considered in his trial strategy, decision to enter a plea, or discussions with his attorney." It is impossible to determine what additional witnesses or evidence defendant might have discovered. Furthermore, we note that the information (if any) that defense counsel learned from speaking with Anastasia did not impel counsel to seek a continuance for further trial preparation. Her failure to seek a continuance reflects "the lack of importance the information had on the outcome of the trial." *People v. Simon*, 2011 IL App (1st) 091197, ¶ 104. Accordingly, defendant has not shown a reasonable probability that earlier disclosure would have changed the outcome of the case.

¶ 17 Defendant also cites Illinois Supreme Court Rule 412(c) (eff. Mar. 1, 2001), which provides, in pertinent part, that "the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused." Defendant notes that the committee comments for Rule 412(c) state, "In providing for *pretrial disclosure*, this paragraph permits adequate preparation for, and minimizes interruptions of, a trial, and assures informed pleas by the accused." (Emphasis added.) *Id.*, Committee Comments (adopted Mar. 1, 2001). As defendant acknowledges, Rule 412(c) does not apply in misdemeanor prosecutions like this. Ill. S. Ct. R. 411 (eff. Mar. 1, 2001). Defendant argues, however, that Rule 412(c) "underscore[s] *** the policy necessitating disclosure prior to trial so that that [*sic*] a defense attorney can both properly advise his client on which plea to enter, and prepare a proper theory of the case."

¶ 18 We agree with defendant that the best practice for prosecutors is to promptly disclose to defense counsel evidence which tends negate the guilt of the accused, regardless of whether the case involves felony or misdemeanor charges. However, it remains that the relevant inquiry here is whether Anastasia's pretrial statement to the prosecutor was material to defendant's guilt. See *Brady*, 373 at 87. As we have explained, to establish materiality under *Brady*, an accused must show that " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Beaman*, 229 Ill. 2d at 74 (quoting *People v. Coleman*, 183 Ill. 2d 366, 393 (1998)). Because the evidence in question did not rise to that level, the trial court's ruling on defense counsel's *Brady* claim was not manifestly erroneous.

¶ 19 In view of the foregoing, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 20 Affirmed.