2019 IL App (5th) 160506-U

NO. 5-16-0506

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Franklin County.
	)	
v.	)	No. 10-CF-194
	)	
ROBERT BRENT TAYLOR,	)	Honorable
	)	Thomas J. Foster,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for aggravated discharge of a firearm is affirmed where the defendant is unable to establish a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

¶ 2 Following a bench trial, the defendant, Robert Brent Taylor, was convicted of aggravated discharge of a firearm for knowingly discharging a firearm at a vehicle, knowing that the vehicle was occupied. On appeal, alleging that the State withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the defendant argues that he is entitled to a new trial. For the reasons that follow, we disagree and accordingly affirm his conviction.

¶ 3 BACKGROUND

¶ 4 In June 2010, a Franklin County grand jury indicted the defendant on one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a) (West 2010)) and one count of reckless discharge of a firearm (*id.* § 24-1.5(a)) as a lesser included offense. The former count specifically alleged that on June 5, 2010, the defendant knowingly discharged a firearm at a vehicle with knowledge that the vehicle was occupied. See *id.* § 24-1.2(a)(2). After numerous continuances, the cause proceeded to a four-day bench trial that commenced in June 2016 and concluded in July 2016. Viewed in the light most favorable to the State (see *People v. Migliore*, 170 Ill. App. 3d 581, 592 (1988)), the evidence adduced at trial established the following.

¶ 5 In March 2010, 41-year-old Rick Hopper began living with his longtime girlfriend, Tina Neibel, at her home on Garrett's Prairie Road in rural West Frankfort. Hopper operated a landscaping business from Neibel's home that routinely required him to leave early in the morning to make long-distance drives to worksites in various locations throughout several states. The defendant resided in a house on a hilltop across the road from Neibel's house and had been living there before she moved into her home in 2008.

¶ 6 After Hopper moved in with Neibel, he and the defendant sometimes argued. As the trial court later noted, the defendant and Hopper "clearly did not like each other." In May 2010, when the defendant discovered that the cover of his telephone box was open, he accused Hopper of "tapping his phone." An argument ensued, during which Hopper became loud and aggressive and shoved the defendant, who was 60 at the time.

¶ 7 On Saturday, June 5, 2010, at approximately 2:30 a.m., Hopper and his two employees, William Laws and Robert Jarvis, were at Neibel's house preparing to leave for a job in Chicago or Kansas City. While they were in the driveway loading up the trailer of Hopper's flatbed diesel truck with trees and equipment, the defendant, armed with a 12-gauge shotgun and a 7.62 x 39 mm rifle, fired multiple shots at them from outside his house. The defendant fired the shots from behind two vehicles that were parked on the hill, and he used the vehicles' headlights to illuminate Neibel's driveway. While the shots were being fired, Hopper and Laws saw bullets hitting the dirt and rocks around them, and they "kept hearing tings off the side of the trailer." At times, they also saw the defendant walking in front of the headlights of his vehicles. Hopper subsequently yelled for Neibel, and when she came outside, she heard a gunshot and a bullet hitting the ground. After taking a protected position behind the truck with Hopper, Laws, and Jarvis, Neibel tried to return to the house, but she heard another shot, and a bullet hit the driveway in front of her. She later noted that while the shots were being fired, the defendant had been "in view at times, screaming and hollering."

¶ 8 From their protected position behind the truck, Hopper and Neibel called 911. The 911 call was received by dispatcher Tracy King. During the 911 call, the defendant fired a shot, which King heard and reported to the Franklin County sheriff's deputies who were en route to the scene. King told Hopper and Neibel to remain where they were and that the responding deputies were setting up a staging area down the road.

¶ 9 After Hopper and Neibel stayed on the phone with King for approximately 20 minutes, Hopper reasoned that he had waited on the deputies long enough and that he and

his crew needed to leave. On the recording of the 911 call, Hopper is heard saying, "Forget it. We gotta go." At that point, Hopper abruptly ended the call with King, and he and his crew got inside his truck, backed out of the driveway, and drove away in the direction of the staging area that the deputies had set up a short distance down the road. Laws was driving the truck; Hopper was in the passenger's seat by the window; and Jarvis was ostensibly seated between them.

¶ 10 When the truck began to drive away, King called Hopper's phone, advising him to stay at Neibel's. While King and Hopper were talking, the defendant fired numerous shots at the truck with the rifle, all of which were heard by the officers who watched as the truck's headlights approached their location. One of the fired bullets entered the top of the truck's driver's side window and exited out of the top of the passenger's side window. The shattered glass from the bullet's entry struck Hopper in the head, causing him to bleed from several resulting cuts. Hopper thought that he had been shot, and he yelled at Laws to keep driving. The bedlam inside the truck was captured on the recording of King's call to Hopper, and Laws later recalled that he "almost went in a ditch." The truck soon arrived at the staging area, where emergency medical personnel attended to Hopper's injury. After speaking with Hopper, Laws, and Jarvis, the deputies at the staging area called their supervisor, Captain Donald Jones.

¶ 11 At approximately 3:30 a.m., Jones called the defendant and asked him to proceed unarmed to the foot of his driveway. The defendant complied and was subsequently arrested. When he was taken into custody, the defendant told Jones that he had been

shooting at coyotes. The defendant also said something about " 'trying to get some sleep[,] and the diesel was running.' "

¶ 12 After obtaining a search warrant for the defendant's home, three spent 12-gauge shotgun shells were found on the ground near one of the vehicles parked on the hill. Two loaded shotguns and a loaded 7.62 x 39 mm rifle were found near the front entrance inside the house. Ballistics testing later established that the spent shells found near the truck had been fired from one of the shotguns and that the other shotgun was inoperable. The 7.62 x 39 mm rifle was "found to be in firing condition." No projectiles were recovered at the scene, which the State's crime scene investigator noted was "common." A "Private Property, No Trespassing" sign with the words "Lead Poisoning" handwritten on it was observed on the front porch of the defendant's home.

¶ 13 At trial, Hopper, Laws, and Neibel testified to the events in question, but Jarvis was not called as a witness. Jones and two of the deputies who had manned the staging area, Deputies Kevin Roye and Robert Beggs, testified as well. The trial court also heard the recordings of the 911 calls with King and saw photographs of, *inter alia*, the bullet holes in the truck's windows and the cuts to Hopper's head. Hopper and Laws were impeached with evidence that in 1999, they pled guilty to federal charges arising from their joint participation in a marijuana distribution operation. The defendant did not testify, but on the defendant's behalf, witnesses stated that he was extremely conscious about gun safety and that Hopper was a less-than-desirable neighbor. One of the witnesses also noted that the defendant was very knowledgeable about firearms and "was a very good shot."

¶ 14 During closing arguments, which the parties made on July 12, 2016, defense counsel zealously maintained that the State failed to prove the defendant's guilt beyond a reasonable doubt. Counsel noted the lack of ballistics evidence that the rifle found in the defendant's home had been fired on the night in question and emphasized that Hopper and Laws were convicted felons who had previously engaged in drug crimes together.

¶ 15 The State noted that the account of the incident provided by Hopper and Laws was corroborated by Neibel, Roye, Beggs, and the recordings of the 911 calls. The State further suggested that the defendant's statements to Jones were implicit admissions of guilt. With respect to the lack of ballistics evidence connecting the rifle to the incident, the State argued that the defendant had ample time to find and dispose of the spent casings prior to his arrest. Following the parties' closing arguments, the trial court continued the proceedings to July 19, 2016, and stated that it would announce its ruling at that time.

¶ 16 On July 19, 2016, before announcing its verdict finding the defendant guilty of aggravated discharge of a firearm, the trial court made several observations regarding the evidence adduced at trial. Specifically stating that it had considered Hopper's and Laws' prior felony convictions when evaluating their credibility, the court found that their accounts of the events in question were credible and corroborated by Neibel, Beggs, Roye, and the recordings of the 911 calls. Rejecting the notion that the defendant had been "shooting blindly in the dark or at coyotes," the court found that the defendant had used the headlights of his vehicles to "illuminate his targets and make them easier to see." The court further found that when the defendant fired the shots at Hopper's truck, the

"truck was moving and obviously being driven by and occupied by a person." The court concluded that the State had proven beyond a reasonable doubt that the defendant had "intentionally discharged a firearm multiple times in the direction of Rick Hopper, Robert Jarvis, William Laws, and Tina Neibel" and had also fired shots "in the direction of Rick Hopper's diesel truck, thereby hitting that truck, when he reasonably knew that the truck was occupied by a person or persons."

¶ 17 After the trial court announced its verdict and set the cause for a sentencing hearing, the State requested that the defendant be held without bond at the Franklin County jail. See 725 ILCS 5/110-6.2(a) (West 2016). The State advised that since the commencement of the defendant's trial, the defendant had been harassing Neibel, Laws, and Hopper and "already [had] a pending case of harassing these same people." When the trial court asked the State to elaborate, the State indicated that Neibel, who now lived in Williamson County, had recently advised the Franklin County State's Attorney's office that the defendant had driven by her home revving his engine. The State also indicated that Laws had advised that the week after he testified against the defendant, the defendant had "followed him everywhere he went around the town of Benton." In response to the State's representations, defense counsel denied the allegations and complained that he had not received any reports of the recent harassment claims. Counsel further noted that the pending harassment charges were six years old and were filed shortly after the charges in the instant case were filed. Emphasizing that the defendant had health issues and that his firearms had previously been confiscated, counsel argued that the defendant did not pose a danger to anyone. The trial court agreed and further indicated its belief that

the defendant was not likely to flee. As an additional condition of his bail, however, the court ordered the defendant to have "absolutely no contact whatsoever with Tina Neibel, William Laws, or Rick Hopper."

¶ 18 In October 2016, the defendant filed a motion for a new trial, in which he specifically alleged, *inter alia*, that "the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), in that it had been contacted during the pendency of the trial by its witness, Tina Neibel, who made additional claims of wrong doing by the Defendant." The defendant noted that he had not learned about Neibel's additional "claims" until the trial court announced its verdict, and the State argued that the defendant should be held without bond. The defendant argued that the information should have been disclosed sooner because it could have been used to impeach Neibel "on the issue of bias and similar issues."

¶ 19 On November 1, 2016, the trial court held a hearing on the defendant's motion for a new trial. When arguing his *Brady* claim, the defendant again maintained that Neibel's assertion that he had harassed her in Williamson County could have been used to impeach her credibility and should have been disclosed sooner than it was. In response, the State advised that Neibel had informally reported the incident "in between the time that the case rested and [the parties] were awaiting verdict." The trial court subsequently denied the defendant's motion for a new trial and sentenced him to a 42-month term of probation on his conviction for aggravated discharge of a firearm. The present appeal followed.

¶ 20 DISCUSSION

¶ 21 On appeal, the defendant argues that he is entitled to a new trial because the State withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The defendant specifically alleges, "Apparently, Ms. Neibel had made statements to the prosecution for some time, which had not been disclosed and only came to light after judgment." He further complains that the State failed to disclose prior to trial that in April 2015, Hopper sustained a brain injury that affected his short-term memory. The defendant suggests that had this information been made available to him sooner, he could have used it to impeach Hopper's and Neibel's credibility, and the outcome of his trial might have been different.

¶ 22 Under *Brady* and its progeny, the State has a duty to learn of and disclose to the defense any evidence that is exculpatory or impeaching, material to guilt or punishment, and known by any individuals acting on the State's behalf. *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). The suppression of such evidence violates due process. *Brady*, 373 U.S. at 87. As a codification of *Brady* (see *People v. Newberry*, 166 Ill. 2d 310, 324 (1995)), Illinois Supreme Court Rule 412(c) (eff. Mar. 1, 2001) 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 as to the offense charged or which would tend to reduce his punishment therefor."

¶ 23 To prevail on a *Brady* claim, a defendant must show that "(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). Evidence is "material" for purposes of *Brady*, "only 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); see also *Strickler*, 527 U.S. at 281 (stating that "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict"). The trial court's denial of a motion for a new trial on the basis of an alleged *Brady* violation is reviewed for an abuse of discretion. See *People v. Rincon*, 387 Ill. App. 3d 708, 725-26 (2008).

¶ 24 Hopper's Brain Injury

¶ 25 In July 2015, the State filed a motion to continue the defendant's trial citing Hopper's involvement "in a traffic crash that resulted in the witness having one of his legs amputated." The motion was granted without objection.

¶ 26 When Hopper later testified at the defendant's trial, the State asked him whether the crash had resulted in any damage to his brain. When Hopper stated that it had, the State asked him whether the damage had affected his memory. Hopper explained that it had affected his memory but that he could nevertheless recall the events of June 5, 2010. After Hopper identified the defendant in open court, the following colloquy occurred:

> "[DEFENSE COUNSEL]: Judge, I have been sitting here and just learned of the fact that Mr. Hopper—I knew [he] was in an accident because I could tell he's got this walker here today, but I wasn't aware of the extent of his injuries. I would like the opportunity to at least *voir dire* him on that before we go too far

afield. Anytime someone tells you they have had a brain injury, I think there's some issue—he testified that it affected his memory to some degree.

THE COURT: So you want to *voir dire* him about his competence to testify as a witness?

[DEFENSE COUNSEL]: Yes.

THE COURT: [State,] any objection?

[STATE]: Judge, I would object. He's testified he remembers that night.

THE WITNESS: I remember it perfect. The only thing—

THE COURT: All right. Well, he's able to—he knows his name. He obviously knows where he is. I think he understood the oath. I mean, there's no indication he didn't. He says he remembers.

What is it about his competency to testify, [counsel], that you think is in question based on what you have seen or what has occurred so far?

[DEFENSE COUNSEL]: When a witness testifies in court under oath that they have had a brain injury and that it affects their memory, then I would think that the State would have to lay out more of a foundation other than a bald assertion that they remember the events in question.

THE COURT: All right. Well, my understanding of competency [is] they just have to understand what it means to tell the truth basically and be able to communicate in some fashion what occurred outside the courtroom that is relevant for the case being in the courtroom. So I'm going to overrule your objection at this point.

> You can question him about his memory and how it's been affected on cross-examination. I think that goes more to [the] weight of his testimony than it does his competency. So—so the objection is overruled for that reason."

¶ 27 When cross-examined, Hopper testified that in April 2015, he struck a truck at a high rate of speed while riding his motorcycle without wearing a helmet. As a result, he sustained a brain injury and one of his legs had to be amputated. Hopper testified that his brain injury affected his short-term memory and that his present recollection of what occurred "[l]ike yesterday and the day before" was "off and on." He further explained, however, that he could "remember about everything" that happened before the accident, even things "from way back like 20, 30 years ago." When asked whether he had previously advised the State that he had sustained a brain injury, Hopper stated, "I don't know if I did or not."

¶ 28 As indicated, the defendant maintains that the State violated *Brady* by not earlier disclosing that Hopper sustained a brain injury. At the outset, we find that the defendant has waived consideration of this claim by failing to properly preserve it. "Generally, to preserve a claimed error, a defendant must both object at trial and include the issue in his posttrial motion." *People v. McDonald*, 2016 IL 118882, ¶ 45. Here, the only objection the defendant made with respect to the testimony regarding Hopper's brain injury was in the context of the defendant's suggestion that Hopper was not competent to testify. Moreover, the defendant raised no claim regarding the injury's disclosure in his motion for a new trial. The defendant thereby deprived the trial court of the opportunity to

address or explore the alleged impropriety and has thus waived any objection on appeal. *People v. Embry*, 249 Ill. App. 3d 750, 764 (1993).

¶ 29 Waiver aside, even assuming *arguendo* that the evidence of Hopper's brain injury was information that the State possessed prior to trial and should have disclosed sooner (see *United States v. Warren*, 454 F.3d 752, 760 (7th Cir. 2006) (noting that "[l]ate disclosure does not itself constitute a *Brady* violation"); *United States v. Earnest*, 129 F.3d 906, 911 (7th Cir. 1997) (noting that while a *Brady* claim can stem from the suppression of evidence that might be relevant for impeachment purposes, "the evidence must be truly impeaching")), the defendant's claim of resulting prejudice is without merit. The defendant contends that had he known of Hopper's brain injury prior to trial, he "could have sought medical evidence of his brain disorder or an expert witness examination," which the defendant speculates could have been used to challenge Hopper's claimed ability to recall the events in question. Claims of prejudice must be based on more than speculation, however (*People v. Ramsey*, 147 Ill. App. 3d 1084, 1091 (1986)), and as the State notes on appeal, that the defendant did not request a continuance so that he could further investigate the matter is inconsistent with his claim of prejudice (see *People v. Simon*, 2011 IL App (1st) 091197, ¶ 104). The defendant also fails to explain how he could have obtained an expert examination under the circumstances (*cf.* Ill. S. Ct. R. 215(a) (eff. Jan. 1, 2018) ("In any [civil] action in which the physical or mental condition of a party *** is in controversy, the court *** may order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition which is involved.")), and an issue not clearly

defined and sufficiently presented is waived on appeal (see *Bublitz v. Wilkins Buick, Mazda, Suzuki, Inc.*, 377 Ill. App. 3d 781, 787 (2007)). Moreover, given that the trier of fact is free to disregard the testimony of any expert (*People v. McGee*, 88 Ill. App. 3d 447, 453 (1980)), we fail to see what an examination would have accomplished under the circumstances. Through its own observations, the trial court determined that Hopper was competent to testify (see 725 ILCS 5/115-14 (West 2016)), and Hopper was thoroughly cross-examined about his memory issues. As the trial court indicated below, the evidence of Hopper's brain injury ultimately went to the weight of his testimony (see *People v. Nowicki*, 385 Ill. App. 3d 53, 86-87 (2008)), which the court found credible because it was corroborated by Laws, Neibel, Roye, Beggs, and the recordings of the 911 calls. Again, evidence is "material" for purposes of *Brady*, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. Here, the evidence of the defendant's guilt was overwhelming, and we agree with the State that at the very least, the defendant is unable to demonstrate that the evidence regarding Hopper's brain injury was material. See *People v. Miller*, 203 Ill. 2d 433, 439-40 (2002). Accordingly, the defendant's *Brady* claim with respect to the issue necessarily fails. *Id*. at 440.

¶ 30 Neibel's Harassment Claim

¶ 31 As noted, in his motion for a new trial, the defendant specifically alleged that the State violated *Brady* by failing to sooner disclose that it had been contacted during the pendency of the trial by Neibel, who had reported additional wrongdoing by the defendant. At the hearing on the motion, the State explained that "in between the time

that the case rested and [the parties] were awaiting verdict," Neibel had advised that the defendant had driven by her home in Williamson County revving his engine. Without specifically addressing the alleged *Brady* violation, the trial court subsequently denied the defendant's motion for a new trial.

¶ 32 On appeal, the defendant suggests that Neibel made numerous and "still unknown statements" to the prosecution during the pendency of the trial. As the State observes, however, this suggestion is wholly unsupported by the record. The defendant then argues that had the "statements" been made available to the defense, the defendant could have impeached Neibel by showing that they were not true. This argument is premised on the defendant's unsupported claim that multiple statements were made. Our analysis, however, is limited to the evidence that while the parties were awaiting the trial court's verdict, Neibel had reported that the defendant had driven by her home revving his engine. See *Simon*, 2011 IL App (1st) 091197, ¶ 101. With respect to that evidence, the defendant is unable to establish a *Brady* violation.

¶ 33 The evidence that the defendant had driven by Neibel's house revving his engine was neither exculpatory nor impeaching. As the State notes on appeal, "on its face," the information was unfavorable to the defendant. We further note that even though the incident was reported after the parties rested, the State could have sought to offer evidence of the incident as additional evidence of the defendant's guilt. See *People v. Berrier*, 362 Ill. App. 3d 1153, 1163 (2006) ("Even after the State has rested its case, the court has the discretion to allow it to put on additional evidence."); *People v. Jones*, 82

Ill. App. 3d 386, 393 (1980) ("Any attempted intimidation of a witness in a criminal case is properly attributable to a consciousness of guilt and is thus relevant.").

¶ 34 On appeal, the defendant ostensibly suggests that even though the incident apparently occurred after the parties rested and even though the State did not subsequently seek to introduce evidence of the incident to supplement its case in chief, the matter could have been used to impeach Neibel because the defense could have attempted to show that the incident did not happen. The defendant does not explain, however, how the defense could have done so, and again, an issue not clearly defined and sufficiently presented is waived on appeal. See *Bublitz*, 377 Ill. App. 3d at 787. Moreover, because the incident was not relevant to a material issue at trial, even assuming that the defendant could have questioned Neibel about the incident on cross-examination, he would have seemingly been required to accept her answer as to whether the event occurred and could not have attempted to disprove her testimony with evidence to the contrary, as he intimates he could have. See *People v. Santos*, 211 Ill. 2d 395, 405 (2004) (noting that a matter is considered "collateral" if it is not relevant to a material issue in a case); *People v. Collins*, 106 Ill. 2d 237, 269 (1985) (explaining that a "cross-examiner may not impeach a witness on a collateral matter; he must accept the witness' answer"). Furthermore, where otherwise inadmissible evidence is offered to establish bias or a motive to lie, the evidence cannot be remote or uncertain and must give rise to the inference that the witness had something to gain or lose by his or her testimony at trial. See *People v. Cookson*, 215 Ill. 2d 194, 214-15 (2005). Here, as the State suggests, because the reported incident ostensibly occurred after Neibel testified at the defendant's

trial, it could not have been used to show that she had something to gain or lose by her testimony. In any event, we conclude that the defendant is unable to establish that the evidence of the incident could have been used to impeach Neibel's credibility or that the result of his trial would have been different had her report been disclosed sooner than it was. By rejecting the defendant's *Brady* claim when denying the defendant's motion for a new trial, the trial court, which sat as the trier of fact, implicitly determined that such was the case.

¶ 35 As previously indicated, when considering a *Brady* claim, "[t]he proper standard of materiality requires that the omission of the evidence be evaluated in the context of the entire record, and if there is no reasonable doubt about [the] defendant's guilt regardless of that evidence, there is no justification for a new trial." *People v. Vargas*, 116 Ill. App. 3d 787, 793 (1983). Here, we find no abuse of discretion in the trial court's denial of the defendant's motion for a new trial, and we reiterate that the evidence at trial overwhelmingly demonstrated that the defendant committed the offense of aggravated discharge of a firearm.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the defendant is unable to establish a *Brady* violation, and his conviction is accordingly affirmed.

¶ 38 Affirmed.