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2013 IL App (3d) 110211-UB

Order filed March 12, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-11-0211 Circuit No. 07-CF-1404
SANJAY BHATIA,)	Honorable Stephen Kouri,
Defendant-Appellant,)	Judge Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court should have granted defendant's motion *in limine* to exclude an edited DVD into evidence where the unedited version was never provided to defendant or his counsel.

¶ 2 Defendant, Sanjay Bhatia, was charged with retail theft and resisting a peace officer. Prior to trial, defendant filed a motion *in limine* seeking to bar the State from presenting as evidence an edited DVD of surveillance footage related to the theft charge. Defendant also filed a motion to sever the charges against him. The trial court denied defendant's motion *in limine* and never ruled

on his motion to sever. At defendant's trial, the edited DVD was played for the jury. The jury found defendant guilty of both charges. On appeal, defendant argues that (1) the trial court erred in denying his motion *in limine*, and (2) he was denied effective assistance of counsel when his attorney failed to pursue his motion to sever.

¶ 3 On August 17, 2012, we issued an order, reversing and remanding defendant's retail theft conviction, finding that the trial court erred in denying defendant's motion *in limine*. *People v. Bhatia*, 2012 IL App (3d) 110211-U (unpublished order under Supreme Court Rule 23). On January 30, 2013, the Illinois Supreme Court entered a supervisory order ordering us to vacate our judgment and reconsider our decision in light of *People v. Taylor*, 2011 IL 110067. We have reviewed *Taylor* and find that it does not apply to the facts of this case. Thus, we confirm our previous holding reversing and remanding defendant's retail theft conviction.

¶ 4 In *People v. Taylor*, 2011 IL 110067, our supreme court, for the first time, addressed the foundational requirements for establishing the accuracy of a process that produces surveillance camera recordings. 2011 IL 110067, ¶ 33. The court found that when determining whether a proper foundation has been laid for surveillance camera recordings, the court should consider the following factors: (1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process. *Id.* ¶ 35. However, this list is nonexclusive. *Id.* Each case must be evaluated on its own and depending on the facts of the case, some of the factors may not be relevant or additional factors may need to be considered. *Id.* "The dispositive issue in every case is the accuracy and reliability of the process that produced the recording." *Id.*

¶ 5 In reaching its decision in *Taylor*, the supreme court found that there is no requirement that no alterations, deletions or changes be made to an original recording that is copied and presented at trial. *Id.* at ¶ 44. Such a requirement would be "overly restrictive." *Id.* According to the supreme court, in any given case, "alterations, deletions or editing may be necessary." *Id.* Unimportant and/or irrelevant material should be removed. *Id.* "In general, most editing will not render evidence admissible but rather will go to the weight of the evidence." *Id.* Editing is acceptable as long as there is no evidence that the recording was the result of tampering or fabrication. *Id.*

¶ 6 While we agree that *Taylor* applies when a party is attempting to establish a foundation for an edited videotape, like the one played at defendant's trial, *Taylor* does not apply in this case because neither defendant nor his counsel ever received a complete copy of the videotape, as required by supreme court rule.

¶ 7 Illinois Supreme Court Rule 412 requires the State, upon written motion, to disclose to defense counsel the existence of surveillance footage and any and all material that the State intends to use at trial. See Ill. S. Ct. R. 412(a)(vi), (b) (eff. March 1, 2001). Rule 412 further obligates the State to "use diligent good-faith efforts to cause such material to be made available to defense counsel." Ill. S. Ct. R. 412(g) (eff. March 1, 2001). When the State violates Supreme Court Rule 412, reversal is required where the information not disclosed is "material," meaning that it undermines confidence in the verdict. See *People v. Preatty*, 256 Ill. App. 3d 579, 589 (1994).

¶ 8 Here, the State had in its possession two videotapes from Sam's Club's surveillance equipment. Pursuant to a court order, those videotapes were to be copied and provided to defendant. Instead of providing defendant with complete copies of the videotapes, which were one-and-a-half hours in length, the State provided defendant with a DVD containing only four-and-a-half minutes

of footage. Despite numerous requests, the State never provided defendant with a complete, viewable copy of the videotapes. Under these circumstances, we find that the State failed to comply with Supreme Court Rule 412.

¶ 9 Furthermore, the surveillance tapes were "material," since the edited version of those tapes was heavily relied on by the State at trial to establish defendant's guilt. For instance, one of the State's witnesses, Janelle Duncan, claimed that the DVD established that defendant committed theft since the DVD showed defendant leaving with two televisions and only paying for one. If the DVD had not been shown to the jury, there is a reasonable probability that the result of the trial would have been different because the DVD was the only demonstrative evidence linking defendant to the crime of theft.

¶ 10 We reverse defendant's conviction for retail theft and remand for a new trial. On remand, the State may introduce the surveillance footage as evidence only if it provides a complete copy of the viewable videotapes to defendant. Otherwise, the DVD cannot be admitted into evidence.

¶ 11 With respect to defendant's second contention on appeal, we reaffirm our holding that defendant was not denied effective assistance of counsel, as fully set forth in our previous order. *People v. Bhatia*, 2012 IL App (3d) 110211-U.

¶ 12 The order of the circuit court of Peoria County is affirmed in part and reversed and remanded in part.

¶ 13 Affirmed in part and reversed and remanded in part.