

FIRST DIVISION
May 15, 2017

No. 1-12-2397

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 19414
)	
EDDIE DOUGLAS,)	Honorable
)	Brian K. Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Case remanded with directions to conduct an evidentiary hearing to determine whether the State informed defendant's trial counsel that police had recovered a knife from the victim's residence seven months before trial.

¶ 2 Defendant, Eddie Douglas, appeals his conviction after a jury trial of attempted first degree murder and home invasion. On appeal, defendant contends (1) the trial court erred in not giving Illinois Pattern Jury Instructions, Civil, No. 5.01 (IPI No. 5.01), where the Calumet City Police Department failed to preserve a surveillance video recording taken from defendant's place

of employment; (2) he was denied a fair trial where the prosecutor called defendant "garbage" in rebuttal closing argument; and (3) his due process rights were violated when the State concealed the existence of a knife that police recovered from the victim's home seven months before trial. For the following reasons, we retain jurisdiction over this appeal and remand for an evidentiary hearing solely on the issue of whether the State informed defendant's trial counsel of the recovered knife.

¶ 3

JURISDICTION

¶ 4 The trial court sentenced defendant on June 25, 2012. This court allowed defendant to file a late notice of appeal on September 17, 2012. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Rule 603 (eff. Oct. 1, 2010) and Rule 606 (eff. Mar. 20, 2009), governing appeals from a final judgment of conviction in a criminal case entered below.

¶ 5

BACKGROUND

¶ 6 Defendant was charged with attempted first degree murder, home invasion, aggravated domestic battery, and aggravated battery in connection with an incident that occurred on October 22, 2007. Prior to trial, defendant filed a motion for sanctions in which he requested dismissal of the case with prejudice. In the motion, defendant argued that the destruction of his employer's surveillance videotape violated his right to due process. At the hearing on the motion, defendant called Doreen Pierce who stated that she worked with defendant at the Baymont Inn on 147th Street in Calumet City. Although Pierce had no recollection of October 22, 2007, her notes show that defendant, who worked as a security guard, left at either 4:00 or 5:00 a.m. She further stated that after defendant left work, he typically called her when he got home to make sure everything was "all right."

¶ 7 Pierce testified that on October 23, 2007, the police came to the Baymont Inn and took a surveillance videotape covering the stairwell, front door, side doors, front desk, elevator, and the outside of the building. She stated that to the best of her knowledge, the videotape shows those areas. In response to questioning, Pierce agreed that she had not "had any opportunity to view the entire tape" nor did she review the tape. When asked whether she "just tendered a copy of the tape," Pierce responded, "Yes." Defendant argued that the videotape was "the most important piece of evidence in this entire case" because it would show whether defendant "was at work or that he wasn't at work." The Calumet Police Department acknowledged that they took possession of the videotape but now cannot be located. Defendant asked that the case be dismissed, "or in the alternative that videotape should be presumed to show that Mr. Douglas in fact was at work."

¶ 8 The State argued that although the police department should have "maintained custody" of the videotape, police who viewed the video would testify that the video recording was scrambled and distorted, and no images were visible. The State further argued that defendant failed to show the evidence was obviously exculpatory or that it was lost in bad faith. Also, other evidence, including DNA evidence and the victim's testimony, connected defendant to the crime. The State argued that the loss of the evidence may arguably indicate negligence, which "may very well be persuasive in the area of cross-examination to a trier of fact," but it does not rise to the level of bad faith supporting dismissal of the case.

¶ 9 After argument, the trial court found that the police officers did not act in bad faith and therefore the sanctions defendant requested are "too severe and not appropriate" in this situation. The court denied defendant's motion, but stated that this issue "is a ripe area for cross-examination of all the detectives that handled the tape and that saw the tape" and "ripe for argument to the jury."

¶ 10 At trial, Isidra Martinez testified that she and defendant married in March of 2005. While they were married, they lived with Isidra's parents at 715 Sibley Boulevard in Calumet City, along with Isidra's three children. Her youngest child was defendant's son. Isidra and defendant slept in the basement bedroom of the house. The house had an alarm system covering the front and back doors, but it was never turned on until defendant moved out in April 2007. When he lived in the house, defendant replaced a few windows in the kitchen and the guest bedroom on the first floor. After defendant moved out in April 2007, Isidra continued to sleep in the basement bedroom and her youngest child slept with her. Her two older children slept in a bedroom on the first floor and the other bedroom on the first floor was a guest room. Isidra's parents slept in a bedroom on the second floor. In July of 2007, Isidra filed for divorce. Although defendant "begged" her to work out their issues, Isidra continued with the divorce proceedings.

¶ 11 On October 21, 2007, Isidra, who was at home with her parents and children, went to bed around 10:00 p.m. Close to 5:00 a.m., Isidra heard a noise in the dark and decided to check it out. As Isidra left her bedroom and walked into the hallway, she "was hit in the head." Isidra struck back, hitting the person in the chest, body, and head. Isidra testified that as she fought her attacker, she recognized "the smell of" defendant. She fell to the floor "kicking and screaming" and then she "blanked out for a minute." When she "came to" and opened her eyes, she saw defendant "running up the first landing of stairs." When he got to the landing where the door was located, Isidra could see defendant's "build" and "the structure of his face."

¶ 12 Isidra screamed for help and ran into her bedroom to retrieve a decorative knife to defend herself. While she was in the bedroom, Isidra saw that her son was awake and staring at her stomach. She looked down and saw a "bulge coming out" of her stomach "like [her] insides" of her stomach, and she was bleeding. She dropped to her knees, crying, and used a pillow to hide

the wound from her son. Isidra managed to use a land line to call 911, and she used a cell phone to call her mother who was sleeping upstairs. She warned both the 911 dispatcher and her mother that defendant could still be in the house. When the 911 operator asked her if she knew who attacked her, Isidra responded that it was defendant. Isidra suffered nine stab wounds to her stomach, the left side of her thigh, her left arm and her knee. She was transported to a hospital in Olympia Fields where she had multiple surgeries to repair her diaphragm, lungs and liver.

¶ 13 Lillie Ajao, Isidra's mother, testified that she woke that morning to a noise but ignored it. She then heard her grandchildren screaming and someone running through the house. Her daughter called her cell phone and told her that "somebody is in the house, hurry up, get to the kids." Lillie grabbed a firearm and went downstairs. At this time, the police were at the front door and Lillie let them in. When she opened the door to let the police inside, the house alarm went off. The alarm had not gone off before this time.

¶ 14 James Randall testified that he was a Calumet City police officer, and on the morning of October 22, 2007, he responded to a report of a stabbing at 715 Sibley. Lillie let the officers inside the house and no offenders were found in the house. Officer Randall found Isidra on the floor of her bedroom with "a pillow clutched to her abdomen." A small child was also in the bedroom, and he saw blood on the pillow, floor, and the mattress. Isidra told Officer Randall that defendant stabbed her. Officer Randall noticed that the window in the first floor guest bedroom was open. Evidence established that the bottom of the window was seven feet above the ground on the outside of the house.

¶ 15 Officer William Coffey testified that on October 22, 2007, he went to 294 Bensley in Calumet City to locate defendant. This apartment was approximately one and a half miles from Isidra's house. When Officer Coffey arrived at the apartment, he noticed a blue Aerostar van that

was "hot to the touch." When he took defendant into custody, he did not find any bloody clothes and did not see any blood on the bed he was lying in. Officer Jeff McBrayer took DNA samples from defendant that morning.

¶ 16 Detective Mitch Growe investigated the stabbing on October 22, 2007, and went to 715 Sibley where he "observed there was a bedroom where the point of entry was made." He also believed the offender exited the house from the same bedroom. He noticed "a black knit hat kind of underneath the bed" in that bedroom, near the window where the offender would have entered and exited. The hat was like a "scull cap where the eyes were cut through here, so kind of like a makeshift ski mask." No fingerprints were recovered from the window. While the hat and other evidence was sent for testing, Detective Growe released defendant on October 23, 2007, because "we wanted the results of that before we actually went through and charged, so we were still conducting the ongoing investigation." Forensic scientists determined that the knit cap recovered from the guest bedroom contained a mixture of DNA from two people, with the major contributor to the DNA profile being defendant. Defendant was taken into custody and charged with attempted murder and home invasion. The State then rested, and defendant moved for a directed verdict which the trial court denied.

¶ 17 Doreen Pierce testified for the defense. Pierce and defendant worked at the Baymont Inn. She stated that on October 21st into the 22nd, defendant was working, leaving at 4:30 a.m. on the 22nd. Pierce knew when he left work because he had to check with her when he wanted to leave. After defendant left, he called Pierce at 5:05 a.m. to check if everything was alright. She also testified that the Baymont Inn has a video surveillance system that records images onto videotape. She stated that the system was working on October 21st and October 22nd. The police looked at the video on October 22, 2007, and Pierce testified that she also looked at the tape

when the officers looked at it. On cross-examination, Pierce acknowledged that she had stated previously in court that she had not viewed the videotape. She also acknowledged that she did not know where defendant was calling from when he called to check on her.

¶ 18 Louise Douglas testified that she is defendant's mother and on October 21, 2007, she was at home at 294 Bensley with defendant. He left for work around 5:30 p.m. and returned at 4:45 a.m. the following morning. Douglas was asleep when he came home, but he knocked on the door and she let him in. Defendant appeared normal and after making a phone call, he went to sleep. Around 5:30 a.m., the police came to the door and she let them inside. She told them that defendant was in the house. Defendant left with the officers, and the officers searched the apartment taking keys and a cell phone. On cross-examination, Douglas admitted that she told officers when they came to her apartment that no one was inside other than herself, but then they found defendant inside.

¶ 19 In rebuttal, Officer Coffey testified that when he went to the Bensley apartment, Douglas answered the door and told him that "no one should be inside." Douglas allowed him to enter and Officer Coffey found defendant awake in the rear bedroom. Douglas did not say what time she thought defendant had arrived home that morning.

¶ 20 Before closing arguments, defense counsel offered IPI No. 5.01, which allows the jury to infer that evidence which a party fails to produce would be adverse to that party. The trial court declined the instruction, over defense counsel's objection. The court noted that before giving the instruction, it must determine that the party would have produced the evidence except for the fact that the evidence would be unfavorable. It found the instruction inapplicable because it is an instruction dealing with the failure to produce evidence, not a burden-of-proof instruction dealing with spoliation, and the State did not "[do] anything to that evidence. They did nothing to

cause the evidence not to be here or cause anything in that tape not to be on that tape." The court also questioned whether a civil jury instruction was appropriate for use in a criminal case.

¶ 21 The jury found defendant guilty of attempted first degree murder and home invasion. Defendant filed a motion for a new trial which the trial court denied. The trial court sentenced defendant to consecutive terms of 10 years' imprisonment for home invasion, and 20 years' imprisonment for attempted first degree murder. Defendant filed this appeal.

¶ 22 ANALYSIS

¶ 23 We first consider defendant's argument that he is entitled to a new trial because the State concealed the existence of a knife recovered by police seven months before trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the 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 U.S. at 87; *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). To prevail on a *Brady* claim, defendant must show that (1) the undisclosed evidence is exculpatory or favors him for impeachment purposes; (2) the State willfully or inadvertently suppressed the evidence; and (3) he was prejudiced because the evidence was material to his guilt or punishment. *Beaman*, 229 Ill. 2d at 73-74.

¶ 24 The State argues that the record is unclear on whether this evidence was actually disclosed to defense counsel prior to trial. Defendant argues, however, that the record shows that the State did not file a supplemental answer to discovery at any time after December 9, 2010, the date the knife was recovered from Isidra's residence. Defendant contends that he obtained this information from DVDs in the appellate record showing photographs of the knife and where in

the house police recovered it. He argues that these photographs were not tendered to the defense but "for some reason" placed in the appellate record by the State.

¶ 25 The State is well aware that the failure to disclose evidence favorable to defendant and material to his guilt or punishment is a violation of his constitutional right to due process (see *Beaman*, 229 Ill. 2d at 73), and we cannot condone such conduct. We find the possibility that the knife was not disclosed to defense counsel even more troubling in light of the fact that the State admittedly lost the surveillance videotape from the Baymont Inn which, defendant argues, contained potentially exculpatory evidence. Since this issue arises for the first time on appeal, the parties did not have a chance to present material facts before the trial court or obtain a ruling on the issue. Therefore, as the State suggests, we retain jurisdiction over this cause but remand to the trial court for an evidentiary hearing on whether the knife was in fact disclosed to defense counsel and if so, when and the manner in which it was disclosed. The hearing should also look into whether any testing was conducted on the knife and any results, if available. The parties are directed to provide this court with a status report regarding the case on remand within 60 days of this order. Within 30 days of the trial court's ruling, defendant as appellant is directed to transmit to the clerk of this court a report of the evidentiary hearing proceedings and any other court records or orders after remand relevant to the evidentiary hearing. The parties may also request a supplemental briefing schedule to address the trial court's ruling on remand and the effect of that ruling, if any, on the remaining issues on appeal.

¶ 26 Remanded with directions; jurisdiction retained.