COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP882-CR **Cir. Ct. No. 2004CF251**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONELL E. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Ronell E. Harris appeals from a judgment convicting him of possessing cocaine with intent to deliver and an order denying his postconviction motion seeking a new trial. On appeal, Harris argues that he was prejudiced and deserves a new trial because the State tardily disclosed

fingerprint information and failed to disclose that Harris allegedly asserted ownership of pants that incriminated him. Harris further claims that a detective's reference to a recognizance bond in an Illinois matter disclosed his criminal history to the jury and prejudiced him. We affirm because Harris was not prejudiced by any of the foregoing, and the circuit court properly denied his request for a new trial.

¶2 We first address the fingerprint dispute. Harris' pretrial discovery request sought exculpatory evidence and reports of scientific testing. Just prior to the start of trial, the prosecutor gave defense counsel a document not previously disclosed. The document contained the following statement by Detective Bloedorn: "I then asked [Harris] if there would be any reason why his fingerprints would be on the packing of this cocaine." Defense counsel protested that the State's previous discovery response did not disclose that fingerprints were found on the cocaine baggie or notify Harris to expect testimony relating to fingerprints. The prosecutor responded that the baggie was not subjected to lab testing because it did not bear any usable fingerprints. Defense counsel countered that the inability to find usable fingerprints was evidence that scientific testing had been attempted and that such information should have been disclosed. The court precluded the State from raising the fingerprint issue on direct examination, but the court allowed Harris to raise on cross-examination whether any efforts were made regarding fingerprints and whether any fingerprints were found on the baggie. In his opening statement, defense counsel stated that no fingerprint testing had been undertaken.

¶3 On cross-examination of Investigator Patton, defense counsel asked, "You certainly had the drugs tested for fingerprints, didn't you?" The investigator responded, "Yes, sir, I did. I had the plastic baggie checked for fingerprints."

Defense counsel objected and sought a mistrial due to a discovery violation and a failure to timely provide exculpatory evidence. Defense counsel contended that Patton's answer to the question suggested that the baggie had been scientifically tested for fingerprints in contrast to the prosecutor's earlier assurance that no scientific testing had been performed. The court found that the investigator's testimony was consistent with the prosecutor's earlier representation and that checking the baggie for fingerprints was not the same as conducting scientific testing.

¶4 Outside the presence of the jury, the court asked the investigator to clarify the expression "checked for fingerprints." The investigator stated that he performed latent print processing on the baggie, the results were inconclusive, and "[t]here were no identifiable prints that I was able to use." The court denied Harris' mistrial motion because the fingerprint information was neutral, i.e., the absence of fingerprints did not favor either the State or the defense, and Harris was not prejudiced.

¶5 Postconviction, Harris sought a new trial due to the fingerprint issue. The circuit court ruled that the fingerprint information was not material, and the State had other, strong evidence linking Harris to the baggie: the baggie was found in a jacket that matched the pants Harris put on when the police came to arrest him, the pants contained Harris' identification card, the jacket and pants were Harris' size, and a duffle bag, which Harris admitted was his, was found near the jacket and contained baggies and identifiers for Harris. The court found that even if the fingerprint information had been disclosed in a timely fashion, Harris would still have been convicted.

¶6 On appeal, Harris argues that the untimely disclosure of the fingerprint information prejudiced him. We do not agree that Harris was prejudiced or that the State violated the disclosure requirements of ***Brady v. Maryland***, 373 U.S. 83, 86 (1963), or WIS. STAT. § 971.23(1) (2003-04).[1]

¶7 Under ***Brady***, a defendant "has a constitutional right to material exculpatory evidence in the hands of the prosecutor." ***State v. DelReal***, 225 Wis. 2d 565, 570, 593 N.W.2d 461 (Ct. App. 1999).

> The United States Supreme Court has summarized the three prerequisites for a ***Brady*** violation as follows: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." "Prejudice," as ***Strickler*** provided, encompasses the materiality requirement of ***Brady*** so that the defendant is not prejudiced unless '"the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"

State v. Harris, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737 (citations omitted).

¶8 Wisconsin's criminal discovery statute, WIS. STAT. § 971.23(1), requires that the prosecutor disclose exculpatory evidence to the defendant within a reasonable time before trial. This statute employs the favorable evidence and materiality tests, and the standard is whether the nondisclosure of the evidence sufficiently undermines the court's confidence in the outcome of the trial. ***Harris***, 272 Wis. 2d 80, ¶¶30-31.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶9 Evidence that the police attempted to lift fingerprints from the baggie does not '"put the whole case in such a different light as to undermine confidence in the verdict."' ***Id.***, ¶15 (citation omitted). We agree with the circuit court that the fingerprint information evidence was not material, and the State had other, strong evidence linking Harris to the cocaine-filled baggie. Even if the fingerprint evidence had been timely disclosed, Harris still would have been convicted. Our confidence in the outcome of the trial is not undermined by the fingerprint issue.

¶10 Harris relies upon ***DelReal*** to argue that the fingerprint information was material. ***DelReal*** is distinguishable. In ***DelReal***, the information not disclosed by the State consisted of the fact that DelReal's hands were swabbed for gun residue after the shooting. ***DelReal***, 225 Wis. 2d at 567. However, the State never tested the swabs for the presence of gunshot residue. ***Id.*** at 569. Postconviction, DelReal requested and received testing, and the results were "negative," i.e., there was insufficient gunshot residue on the swab to yield a positive finding. ***Id.*** An expert who performs gunshot residue tests testified postconviction that a negative result is inconclusive because the shooter "could have wiped off the gunpowder" or "no residue may have been emitted onto the shooter's hands." ***Id.*** at 570. On appeal, the court deemed this evidence exculpatory in nature and relevant and found that the State had failed to disclose it. ***Id.*** at 571.

¶11 Here, however, there was no material to be tested. It is undisputed that fingerprints could not be lifted from the baggie to submit for testing and evaluation, and the jury was so informed. The absence of usable fingerprints supported Harris' defense that he was not involved in the drug operation and there was no evidence linking him to the drug operation. The fingerprint information

was consistent with Harris' defense strategy, and the issue did not render Harris' trial unfair.

¶12 Although we do not reverse on the fingerprint issue, we take this opportunity to observe that the district attorney's office less than carefully handled the information that fingerprints could not be lifted from the baggie. Well after the trial started, the State located the report with this finding in a co-actor's prosecution file; the report was not in Harris' prosecution file. The report should have been maintained in such a fashion as to be included in the State's response to Harris' pretrial discovery requests. Such conduct could be deemed prejudicial failure to disclose in the appropriate case.

¶13 Relying upon WIS. STAT. § 971.23(7m)(b), Harris complains that the circuit court did not properly advise the jury of the State's role in the fingerprint dispute. Defense counsel asked the circuit court to advise the jury of the State's conduct relating to the fingerprint issue. Section 971.23(7m)(b) permits the circuit court to "advise the jury of any failure or refusal to disclose material or information required to be disclosed … or of any untimely disclosure of material or information required to be disclosed …." When the jury returned, the court reminded the jury that counsel had an obligation to object and that matter has been resolved. We reject this argument. The State did not violate § 971.23 because the fingerprint evidence was not material.

¶14 Harris next argues that the State failed to disclose to defense counsel his statement that the pants he put on at the time of his arrest belonged to him. During trial, Bloedorn testified that he was assisting in the execution of a search warrant at a residence. When Bloedorn encountered him, Harris was handcuffed but clad only in underwear. Before being transported, Harris asked for additional

clothing. The detective testified that Harris stated that "[t]here was a pair of, like, green denim jeans that [Harris] asked to have." The jeans were on the floor in front of the couch where Harris was sitting. Defense counsel objected because the State's discovery response did not indicate that Harris made any statement about the pants. The court determined that Harris could explore the issue on cross-examination. Thereafter, the detective clarified that he did not prepare a report about the conversation with Harris that preceded Harris putting on the pants. The detective further testified that when he asked Harris who owned the duffle bag found in a closet, Harris stated that it belonged to him.

¶15 Detective Roeseler testified that he also participated in the execution of the search warrant. The green pants were within a foot of the couch and appeared as if they had been left there by someone who had "taken them off and laid them on the floor before they sat down." The pants pocket contained $615 in cash plus Harris' Illinois identification card. In the detective's experience, the cash and the presence in the residence of drug manufacturing and distribution paraphernalia were hallmarks of a drug dealing operation. The detective testified that neither he nor Bloedorn suggested to Harris that he put on the green pants. In a bedroom, the police located a green denim jacket which matched the pants Harris put on. The jacket and the pants were of a size to fit Harris. In a jacket pocket, the police found a baggie containing crack cocaine. Below the jacket, police found a duffle bag containing clothing, baggies and papers bearing Harris' name, including "a court bail bond, some kind of court paperwork for Ronell Harris." The court later instructed the jury to disregard Bloedorn's reference to Harris' statement identifying the green pants as his.

¶16 Postconviction, the circuit court rejected Harris' argument that the State failed to disclose Harris' statement regarding the pants. The standard is

whether the nondisclosure of Harris' statement about the pants sufficiently undermines the court's confidence in the outcome of the trial. ***Harris***, 272 Wis. 2d 80, ¶15. Our confidence is not undermined. There was other evidence that the pants belonged to Harris, including their proximity to where Harris was found, the identification found in the pants, and the fact that the pants fit Harris. Furthermore, the circuit court instructed the jury to disregard Bloedorn's reference to Harris' statement about the pants. Juries are presumed to follow all the instructions given. ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). Harris was not prejudiced by Bloedorn's reference to his assertion of ownership of the pants.

¶17 Finally, Harris argues that the detective's reference to a recognizance bond found in the duffle bag was prejudicial error. We disagree and conclude that admitting the testimony was harmless error. We will assume without deciding that evidence that Harris had been subject to a recognizance bond was improperly admitted. However, an error is harmless if it is '"clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."' ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). As discussed above, there was other sufficient evidence of Harris' guilt. A rational jury would have found guilt even without the reference to the recognizance bond.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.