

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 27, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2410-CR**

**Cir. Ct. No. 2008CF4211**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JIMMYE RICHARDSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Jimmye Richardson appeals the judgment convicting him of first-degree reckless homicide as a party to a crime. See WIS.

STAT. §§ 940.02(1), 939.05 (2007-08).<sup>1</sup> Richardson raises two evidentiary issues on appeal. First, Richardson argues that the State failed to timely provide legally required discovery concerning one of its witnesses. Second, Richardson argues that the trial court erred when it allowed evidence of a witness's prior inconsistent statement. We disagree in both regards and affirm.

### **BACKGROUND**

¶2 Richardson, along with a co-defendant, was charged with killing Timothy Cotton. The case proceeded to a jury trial.

¶3 Detective Mark Peterson was one of the State's witnesses. Prior to his trial testimony, Detective Peterson was questioned outside the presence of the jury. During this process, Detective Peterson testified that he held a desk job with the homicide review committee. Detective Peterson relayed that he was removed from the homicide unit following allegations that he attempted to contact witnesses in connection with an armed robbery charge against his son. Detective Peterson acknowledged that the professional performance division was investigating the citizen complaint against him. He denied attempting to contact or speak to any of the witnesses related to his son's case.

¶4 Based on this testimony, Richardson sought to exclude Detective Peterson as a witness. Richardson argued that there had been a discovery violation. He claimed that if the information presented had been made available to him earlier, he would have investigated the complaint against Detective Peterson.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Richardson argued that an investigation might have revealed that the complaint constituted admissible other acts and impeachment evidence. Richardson argued that given the late disclosure, the only fair remedy was to exclude Detective Peterson as a witness.

¶5 The trial court denied Richardson's motion to strike Detective Peterson as a witness. The trial court concluded that the State did not have to disclose the information, and as such, there was no discovery violation.

¶6 Detective Peterson proceeded to testify that he had met with witness Cedric Jones and had shown Jones a photo array that included a photograph of Richardson. According to Detective Peterson, Jones identified Richardson as one of the shooters. Jones told Detective Peterson that he could see Richardson's face and was one hundred percent positive as to the identification.

¶7 Earlier in the trial, Jones had testified that he could not identify the shooter. He told the jury he did not remember identifying the shooter in the photo array or indicating that he was one hundred percent positive that one of the individuals was the shooter.

¶8 Kimberly Mayfield, Cotton's sister, also testified for the State. Mayfield testified that the night Cotton was killed, he had come to visit her at her home. After being inside for ten to fifteen minutes, Cotton left, going out the front door. Cotton never made it to his car. Mayfield testified that as she watched from the window, she saw three young men start hitting Cotton. When she went outside, one of the men pulled up his shirt and Mayfield saw a gun. Another pointed a different gun at Cotton's head. Seeing this, Mayfield ran inside the house. When she returned with her son and her boyfriend, the men in the altercation with Cotton ran separate ways. One of the men started shooting, but

Mayfield testified that she could not see which one. When she ran to help Cotton, Mayfield saw that he had been shot. Mayfield did not identify Richardson in court as being one of the men she saw hitting her brother. She testified that she was not sure.

¶9 Mayfield also testified that she met with Detective Daniel Thompson after the shooting. Detective Thompson showed her a series of photographs; however, Mayfield did not recall identifying any individuals in the photo array. She testified that if Detective Thompson were to say that she had identified an individual out of the photographs she was shown and had indicated to him that the individual looked like one of the men involved in Cotton's death, her recollection would not be refreshed.

¶10 Detective Thompson testified next for the State. He recalled meeting with Mayfield and showing her two series of photo arrays. Detective Thompson identified Richardson as the individual whose photograph was included in the photo array series. According to Detective Thompson, after showing Mayfield the photo array containing Richardson's photograph, she stated that Richardson looked like the person she believed was the shooter but that she was not one hundred percent positive.

¶11 Following Detective Thompson's testimony, the trial court addressed Richardson's objections to it. Richardson objected that Detective Thompson's testimony was extrinsic evidence of a prior inconsistent statement and that Mayfield had not been examined in a way that allowed her to admit or deny her purported statements to Detective Thompson. In addition, Richardson asserted that the testimony was overly prejudicial. The trial court disagreed, finding that Mayfield had been confronted with her statement and that it fit the

hearsay exception as a prior inconsistent statement. The trial court further found that the statement was not overly prejudicial.

¶12 The jury subsequently convicted Richardson, and the trial court sentenced him to forty-one years in prison, consisting of thirty-one years of initial confinement and ten years of extended supervision.

## DISCUSSION

### *A. Whether the State had a duty to disclose to the defense the citizen complaint against Detective Peterson.*

¶13 Richardson first argues that the State failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This claim relates to the citizen complaint against Detective Peterson, which Richardson argues was a clear allegation of witness tampering. He claims that if he had known about it prior to trial, he would have been able to investigate it, and “[t]he citizen would then have possibly been able to testify at trial as other acts evidence.”

¶14 To establish a *Brady* violation, a defendant must show that undisclosed evidence was both favorable and material. *State v. Harris*, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737. Favorable evidence “encompasses both exculpatory and impeachment evidence.” *Id.*, ¶12 (footnotes omitted). Evidence is favorable to an accused when, if disclosed, it may make a difference between conviction and acquittal. *Id.* Evidence is material when ““there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”” *Id.*, ¶14 (citation and one set of quotation

marks omitted). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.*

¶15 Richardson appears to argue that the information was potentially exculpatory insofar as it would have prompted additional investigation, which might have led to evidence that was actually exculpatory. As the State points out, the mere possibility that information “might have helped the defense ... does not establish ‘materiality.’” *Id.*, ¶16 (citation and one set of quotation marks omitted; ellipses in *Harris*). A prosecutor is not required to share all useful—but nevertheless immaterial—information with the defendant. *Id.* Because Richardson has not established its materiality, we conclude that that the State did not violate his discovery rights under *Brady* by failing to disclose earlier the citizen complaint against Detective Peterson.

***B. Whether the trial court erred when it allowed evidence of Mayfield’s prior inconsistent statement.***

¶16 Richardson points out that Mayfield never denied identifying Richardson in the photo array. Rather, she testified that she could not remember having made any identification. Citing *State v. Lenarchick*, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), he contends that lack of recollection without bad faith is not an inconsistency.

¶17 A trial court’s decision regarding the admission of hearsay evidence is discretionary and will not be reversed unless that discretion is misused or the court’s decision rests upon an erroneous view of the law. *State v. Stevens*, 171 Wis. 2d 106, 111, 490 N.W.2d 753 (Ct. App. 1992). We conclude that the trial court correctly ruled that Mayfield’s prior statement to Detective Thompson was inconsistent with her trial testimony.

¶18 Richardson’s argument hinges on Mayfield’s testimony at trial that she did not recall making an identification when she was shown a photo array. Richardson, however, overlooks the other testimony offered by Mayfield at trial. Namely, Mayfield testified that as the men who had been hitting Cotton scattered, one started shooting. Mayfield stated that she did not, however, see which of the men was shooting. This testimony was inconsistent with her prior statement to Detective Thompson, when after looking at the photo array, she said Richardson looked like the person she believed was the shooter. Mayfield’s statement to Detective Thompson necessarily implies that she saw the shooter. Consequently, this was not simply a matter of Mayfield saying she did not recall making a prior identification. Mayfield’s trial testimony was inconsistent with her prior statement to Detective Thompson. As such, it was within the trial court’s discretion to admit evidence of that statement.<sup>2</sup>

*By the Court.*—Judgment affirmed.

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

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<sup>2</sup> We need not address the alternative argument made by the State that Richardson forfeited his right to argue that Mayfield’s prior statement was not inconsistent. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

