

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC COOPER,	§	
	§	No. 562, 2009
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Kent County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0808019339
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: March 31, 2010

Decided: April 12, 2010

BEFORE **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This day of April 2010, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Eric Cooper (“Cooper”), the defendant below, appeals from a Superior Court final judgment of conviction of First Degree Assault, ten counts of Possession of a Firearm During the Commission of a Felony, five counts of First Degree Attempted Robbery, three counts of First Degree Reckless Endangering, First Degree Burglary, Wearing a Disguise During the Commission of a Felony, and Second Degree Conspiracy. On appeal, Cooper claims that his convictions

should be reversed because the State violated its obligation to disclose evidence favorable to his defense (a *Brady* violation).¹ We find no violation and affirm.

2. On May 22, 2008, two armed “ninja-dressed” individuals entered the apartment of Eric Ross (“Ross”) in Dover.² Ross was entertaining friends that evening. The armed intruders told the apartment occupants to throw their cell phones and wallets on the floor. After shooting Ian Mason, a guest who tried to reason with them, they fled the apartment.

3. On May 26, 2008, the Dover Police recovered a 0.22 revolver, a shotgun, and several items of dark clothing from a construction site on Division Street. A ballistic examination established that the revolver was stolen earlier that month, during a residential burglary in Dover (“Bicentennial Village Burglary”),³ and that a bullet found in Ross’ apartment “was consistent with being fired” from that revolver. Cooper’s DNA was consistent with a DNA profile collected from the revolver.⁴

4. On August 15, 2008, Sergeant Gerald Windish, Jr. (“Windish”) of the Delaware State Police informed the Dover Police that he had arrested Christopher

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

² One intruder held a revolver. The other held a sawed-off shotgun.

³ Cooper and Josh Reeves were arrested in connection with the Bicentennial Village Burglary.

⁴ The State’s expert explained that “Cooper is not excluded as the DNA contributor in the [revolver] swabs,” and that the probability that the DNA profile of an unrelated individual would match the DNA from the revolver is very low.

Reeves (“Reeves”), who had provided Windish with information about a shooting in Dover. Reeves was arrested for receiving stolen property, including stolen firearms, and was in possession of a shotgun stolen in the Bicentennial Village Burglary. That same day, Reeves was questioned by Detective Jeffery Melvin (“Melvin”) of the Dover Police. Reeves stated that Cooper had told him about the May 22 shooting. On August 18, 2008, Reeves gave a third statement in which he repeated his story about Cooper’s confession, and identified Isaac Pearce as the second intruder.

5. Cooper was arrested on August 26, 2008 and charged with First Degree Attempted Murder, ten counts of Possession of a Firearm During the Commission of a Felony, five counts of First Degree Attempted Robbery, three counts of First Degree Reckless Endangering, First Degree Burglary, Wearing a Disguise During the Commission of a Felony, and Second Degree Conspiracy.

6. Reeves testified at Cooper’s trial. The State, however, did not identify Reeves as a witness until its opening statement. At the end of the first trial day, Cooper’s counsel had two conversations with Reeves, in which Reeves told counsel that the State “had it all wrong” and that he had told the police, on several occasions, that he “just didn’t know nothing.” The following day, defense counsel raised the issue of Reeves’ expected testimony in a chambers conference. Defense counsel complained that he had not received Reeves’ full statements to the police,

but only a copy of the police report summarizing those statements.⁵ He also described his conversations with Reeves, and was told by the prosecutor that Reeves never recanted. The Superior Court ruled that Reeves' conversations with defense counsel raised no *Brady* issue, advised defense counsel to cross-examine Reeves about those conversations, and instructed the State to provide defense counsel with Reeves' recorded statements by the end of the day.⁶

7. Reeves testified that Cooper had told him that he shot an Asian male during a robbery, using a weapon that Cooper obtained in a burglary. Reeves also testified that he was arrested on August 15, 2008, and charged with Receiving Stolen Property (firearms and copper wire) and Possession of Firearm by a Person Prohibited. Portions of Reeves' August 15 statements were played at trial, under 11 *Del. C.* § 3507. Defense counsel extensively cross-examined Reeves.

8. During his testimony, Detective Melvin mentioned that Reeves' uncle, Josh Reeves ("Josh"), had been arrested in connection with the Bicentennial Village Burglary, and that after his arrest Josh told the Dover Police that he

⁵ It is unclear whether that report also summarized Reeves' August 18 statement.

⁶ When cross-examined, Reeves admitted that he had told defense counsel about several attempts to recant his prior statements. Reeves explained that defense counsel "kept like bugging me, you know, like nagging me, getting on my nerves. So, you know, I didn't say anything." Additionally, defense counsel's partner testified that she was present during the conversations with Reeves, and that Reeves had admitted that what he had told the police was not true.

“wanted to make a deal.” Defense counsel objected, and the Superior Court sustained the objection on hearsay grounds.

9. Cooper, who testified in his own defense, admitted that he had handled the revolver, but denied any involvement in the shooting. The jury found Cooper guilty of First Degree Assault—a lesser included offense of Attempted Murder, and guilty on all remaining counts.⁷ This appeal followed.

10. On appeal, Cooper contends that the State violated *Brady* by failing to timely disclose: (i) Reeves’ criminal record, (ii) all of Reeves’ recorded pre-trial statements, and (iii) Josh’s alleged agreement with the State. This Court reviews *de novo* claims of constitutional error, including claims that the State failed to turn over *Brady* material.⁸

11. In *Brady v. Maryland*, the United States Supreme Court held that the prosecution must disclose to the defense evidence favorable to the defendant.⁹ “There are three elements to a *Brady* violation: 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; and prejudice

⁷ Cooper was sentenced to a total of 71 years at Level V, of which 49 years were aggregate minimum mandatory terms.

⁸ *Atkinson v. State*, 778 A.2d 1058, 1061 (Del. 2001); *Cabrera v. State*, 840 A.2d 1256, 1268-69 (Del. 2004); *Starling v. State*, 882 A.2d 747, 756 (Del. 2005).

⁹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“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.”).

must have ensued.”¹⁰ Prejudice exists where the suppressed evidence is material to the determination of guilt or punishment, and undermines confidence in the outcome of the trial.¹¹

12. Cooper claims that the State violated *Brady* by providing his counsel with copies of Reeves’ criminal record and recorded statements to the police after trial commenced, and only one day before Reeves first testified.¹² “When a defendant is confronted with delayed disclosure of *Brady* material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively.”¹³

13. Cooper argues that he would have been able to develop a different strategy and lines of questioning to attack Reeves’ credibility, had he received Reeves’ criminal record and statements before trial. But, Cooper’s counsel chose not to ask for more time to investigate the belatedly disclosed evidence, despite

¹⁰ *Norman v. State*, 968 A.2d 27, 30 (Del. 2009) (citation omitted).

¹¹ *Atkinson*, 778 A.2d at 1063.

¹² A prosecution witness’ criminal record usually qualifies as *Brady* material, because it might undermine that witness’ credibility. See *Johnson v. State*, 607 A.2d 1173, 1176 (Del. 1992); *Boyer v. State*, 436 A.2d 1118, 1126-27 (Del. 1981) (“If the State ... has ... criminal records of witnesses for the prosecution, *Brady*, of course, would mandate disclosure of those records to a defendant who requests them; otherwise the State could purposely withhold such records from the defendant in order to prevent him from using them to challenge the veracity of the State’s witnesses.”). We do not address the question of whether the recorded statements were favorable to Cooper and should have been disclosed before trial.

¹³ *White v. State*, 816 A.2d 776, 778 (Del. 2003) (citation omitted); *Rose v. State*, 542 A.2d 1196, 1199 (Del. 1988).

being offered additional time by Superior Court. Cooper cannot claim for the first time on appeal that the delayed disclosure of that evidence adversely affected his cross-examination of Reeves. Although we do not condone tardy disclosure of *Brady* material, here the timing of discovery did not deny defense counsel an opportunity to use the material effectively and, therefore, did not constitute a *Brady* violation.¹⁴

14. Cooper claims that the State committed *Brady* violations by failing to disclose: (i) Josh’s statement that he “wanted to make a deal,” and (ii) any agreement between Josh and the State. Cooper does not explain why information about a deal between Josh and the State would have been exculpatory, other than that he could have used it to further impeach Reeves (Josh’s nephew).

15. Even if the information about Josh was favorable impeachment evidence, Cooper has failed to show that that information was *materially* favorable to him—*i.e.*, that the suppression of that evidence undermines confidence in the outcome of the trial. Josh was not a witness in Cooper’s trial. Josh’s offer to “make a deal” came after he (Josh) was arrested for the Bicentennial Village Burglary, rather than in reaction to Reeves’ arrest. Any connection between Josh’s statement and Reeves’ testimony at Cooper’s trial is too remote to be material.

¹⁴ *White*, 816 A.2d at 778 (holding that untimely disclosure of State witness’ criminal history did not constitute a *Brady* violation because defense counsel did not ask for a continuance or assert a *Brady* violation before trial).

Cooper cannot meet “the standard of materiality [required for a *Brady* violation] by merely positing the existence of evidence and speculating about its nature.”¹⁵ Therefore, Detective Melvin’s interrupted testimony about Josh did not establish a basis to find a *Brady* violation.¹⁶

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹⁵ *Saunders v. State*, 567 A.2d 423 (Table), 1989 WL 136937, at *6 (Del. Sep. 29, 1989).

¹⁶ *Patten v. State*, 988 A.2d 938 (Table), 2010 WL 424248, at *2 (Del. Feb. 3, 2010) (holding that there is no basis to find a *Brady* violation where the defendant provided no information about the contents of allegedly suppressed prior out-of-court statements, nor explained how those statements could have exculpated him).