

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WHAAJAAHAT UL'HANIF,

Defendant-Appellee.

UNPUBLISHED

August 18, 2000

No. 220764

Recorder's Court

LC No. 98-001410

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

The victim in this case died when a car pulled alongside him while he was driving and shot into his car. A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, three counts of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court granted defendant's motion for a new trial based on its finding that the prosecutor committed prosecutorial misconduct in withholding information from defense counsel until late in the trial. The prosecutor appeals by leave granted. We reverse.

The prosecutor argues that the trial court erred in granting defendant's motion for a new trial in part because the information was not exculpatory. We agree. We review a trial court's decision to grant a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). A trial court may grant a new trial based on any ground that would support reversal of a criminal conviction on appeal or because the court believes the verdict has resulted in a miscarriage of justice. *Id.* In deciding whether the trial court abused its discretion, we must examine the trial court's reasoning. *Id.* "This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief." *Id.*

Due process requires that a criminal defendant have access to certain information that the prosecutor possesses. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained the evidence with reasonable diligence; (3) that the prosecutor suppressed favorable evidence;

and (4) a reasonable possibility that had the prosecutor disclosed the evidence, the outcome of the proceedings would have been different. *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998); *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). The fourth prong is the materiality requirement of the *Brady* test. *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998); *Lester, supra* at 282. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Lester, supra* at 282. Therefore, undisclosed evidence will be deemed material only if it could reasonably be taken to put the entire case in such a different light as to undermine confidence in the verdict. *Id.*

The undisclosed evidence in this case was not favorable to the defendant, and, accordingly, no *Brady* violation occurred. The prosecutor's evidence established that the spent shell casing discovered in defendant's brother's car came from the same weapon as the bullets and casings recovered from the victim's car. The evidence that the prosecutor withheld consisted of casings and bullets that the police recovered from other locations unrelated to the victim's murder, and which were fired from the same weapon that was used to commit the murder. This evidence did not exonerate defendant. Rather, it tended to show that defendant fired the gun at other locations.

Defendant argues that if he had known that one of these other locations was the residence of a man named Dominique Hardin, this information would have altered his theory of defense. However, the fact that the police recovered three spent slugs from Hardin's house would only have served to exonerate Hardin as a suspect in the victim's murder. The slugs that the police collected from Hardin's house were fired from the same weapon that was used in the victim's murder and matched the spent casing that the police recovered from defendant's brother's car. The jury could have reached the logical conclusion that defendant fired the shots at Hardin's house. Contrary to defendant's argument, the information did not implicate Hardin as the murderer because such an inference would have meant that Hardin fired the shots at his own house.

Because the evidence was not favorable to defendant, a reasonable probability did not exist that the outcome of the proceeding would have been different if the prosecution had disclosed the information at an earlier time. *Fox, supra* at 549; *Lester, supra* at 281-282. Further, the prosecution in this case ultimately did turn the withheld information over to defense counsel, and defendant had the information available for his defense. We conclude, based on the foregoing, that the trial court abused its discretion in granting defendant's motion for a new trial because the prosecutor in this case did not violate *Brady*.

Reversed and remanded for reinstatement of the jury's verdict. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell