REVERSE and REMAND; and Opinion Filed August 22, 2017.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01182-CR

JEROME DEAMUS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause No. F13-56260-L

MEMORANDUM OPINION

Before Justices Fillmore, Brown, and O'Neill[1]
Opinion by Justice Brown

A jury convicted appellant Jerome Deamus of capital murder. The trial court assessed a mandatory sentence of life imprisonment without parole. *See* TEX. PEN. CODE ANN. § 12.31 (West Supp. 2016). In nine issues, appellant generally complains: (1) the State violated a pretrial discovery order and the Michael Morton Act by failing to produce oral statements made by James Hicks and Vinson Ruff, two alleged eyewitnesses to the offense; (2) the State violated *Brady v. Maryland,* 373 U.S. 83 (1963) by failing to disclose evidence that impeached the credibility of James Hicks; (3) the trial court abused its discretion by admitting a recording of appellant's custodial interrogation into evidence; and (4) the evidence is legally insufficient to

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[1] The Hon. Michael J. O'Neill, Justice, Assigned.

support his conviction for capital murder. For the following reasons, we reverse appellant's conviction and remand this case to the trial court for a new trial.

I. Background

A. The Investigation

On May 26, 2013, brothers Christopher ("Chris") and Cecil ("Cecil") Ferguson sustained fatal gunshot wounds at a Dallas nightclub. Appellant was later charged, tried, and convicted of the capital murder of Chris under the theory that appellant caused the deaths of both Chris and Cecil in the same criminal episode.

The murder investigation began shortly before 2:00 a.m. on May 26, 2013, when police received calls about a shooting at the Dallas nightclub, Club Copa. Patrol officers arrived shortly thereafter and found a twenty-one-year-old man, identified as Chris, lying face down on the club's fenced outdoor patio. Chris had sustained a gunshot wound to the head, which later caused his death. A man identified as Chris's thirty-nine-year-old brother, Cecil, was found inside the club, near the door to the patio. Cecil had sustained a single gunshot wound to the chest and died at the scene.

Patrol officers secured the scene and detained potential witnesses to be interviewed by homicide detectives. One of the patrol officers, Ernesto Elizondo, also asked the owner of the bar, James Hicks, to show him the footage from a surveillance camera on the patio. The surveillance camera images showed: 1) Chris talking to a group of people on the patio; 2) Chris punching one of the people; 3) customers fleeing; and 4) Chris lying motionless on the ground. The images are grainy and do not show facial features.

Homicide Detective Colleen Shin arrived at the crime scene, where officers directed her to two potential witnesses, neither of whom saw the actual shootings. Shinn asked people who

were standing around the crime scene if they witnessed anything, but "[m]ost were employees of the bar and had been inside at the time of the shooting."

Police located two potential witnesses at the hospital where Chris had been taken. Chris Gardner, a friend of the victims, told police he went with the victims to the nightclub at around midnight. Shortly after they arrived, a man in a gray t-shirt, identified as appellant, accidently knocked a drink out of Chris's hand. Gardner said Chris and appellant exchanged words, and the situation seemed to be resolved. However, about an hour later, appellant approached Chris and the two men exchanged words again. Chris punched appellant in the face, causing appellant to stumble backward. Gardner told police he next heard gunshots, but he did not see appellant with a gun and he did not know who fired the shots.

Two women, Jonisha Frierson and Dateisha Ross, subsequently came forward and told police that appellant had confessed to them that he had shot both victims. Meanwhile, police identified a man named Vinson Ruff as a potential suspect. Ruff told police that he was with appellant on the patio at the time of the shooting. He said one of the victims punched appellant, and appellant started shooting. However, Ruff also told police he did not actually see appellant with a gun that night.

Two days after the shootings, appellant was arrested for capital murder. When questioned by police, appellant admitted being at Club Copa at the time of the shooting but initially denied shooting anyone. After questioning, appellant told police the victims jumped him and he "just started shooting." He said the incident occurred by the DJ booth and that he used a 9 mm gun. When appellant was told he was still going to jail that night and police could not tell him what punishment he would receive for shooting in self-defense, appellant retracted his confession and again denied he shot anyone.

Appellant was indicted for capital murder. The indictment alleged appellant knowingly and intentionally caused the death of Chris by shooting him with a firearm and, in the same criminal transaction, also knowingly and intentionally caused the death of Cecil, also by shooting him with a firearm. TEX. PENAL CODE § 19.03 (West 2011).

B. Pretrial Discovery

Prior to trial, appellant filed a motion for discovery specifically requesting the State be ordered to produce all physical evidence and "[a]ny statements by any party or witness to [the] alleged offense in the State's possession or within its knowledge, including any law enforcement agency, whether such statements were written or oral, which might in any manner be material to either Defendant's guilt or innocence or punishment, if any." Several months before trial, appellant presented his motion to the trial court. At a hearing on the motion, the State expressly stated that it had no objection to any of appellant's requests. The trial court granted all of appellant's requests.

The State produced witness statements and other evidence obtained by police over the course of their investigation. Based on the information the State provided to appellant, it appeared that (with the exception of the statement appellant gave police) all of the evidence indicated that both victims were shot on the patio. In addition, it also appeared the State did not have a single eye-witness who could place appellant on the patio with a gun in his hand at the time of the shooting.

C. Trial

Opening Statement by Prosecution

The prosecutor's opening statement was short and, when it came to the actual shootings, vague. According to the court reporter's transcript, she stated:

May it please the Court. Defense counsel. Ladies and gentlemen of the jury, you are about to hear the story of what happened on May 26, 2013, that resulted in the death of two brothers, Christopher and Cecil Ferguson. The evidence is going to show you that leading up to the death of those two brothers were a series of choices, choices made by this [appellant], Jerome Deamus.

You're going to hear that night that he had been with a friend, who you are going to meet, Vinson Ruff. I'm going to tell you, he's going to come out here in jail clothes. There's going to be some witnesses that you don't like, but what I want you to do is to listen to what he says and then decide what you think. He's going to tell you that night he had been with [appellant] and they decided to go to Club Copa, which you're going to hear is just down the street from the courthouse right around [Highway] 30 and Riverfront. You're going to hear that the [appellant] chose to bring a gun to that club. That was a choice he made before he went into that club. The fact that he had a gun on him is going to be confirmed by several witnesses and that it was on him from the beginning of that night.

You're going to hear from Dateisha Ross, who was dancing with the [appellant] and he pulled up his shirt and he showed her the gun. You're going to hear that the [appellant] and one of the brothers got into kind of a little disagreement over something silly, a spilled drink. You're going to hear that that is what set off this [appellant]. The evidence is going to show you that he never really got over this spilled drink. Everybody around them kind of thought this was a disagreement that was squashed, but it wasn't. He was still mad.

Some time passes and everybody ends up back on the patio. You're going to see video of that patio and you're going to see video of the first shooting and you're going to see what leads up to that. When you take a look at that video, it's going to be clear to you that the reason that Christopher died is because the [appellant] chose to shoot him. You're not going to see any evidence of self-defense, you're not going to see any evidence of anything other than a choice.

I'm going to tell you that my victim, Christopher Ferguson, he hits the [appellant] first. He thought there was going to be a fist fight. That's what everyone who observed this encounter is going to tell you, I thought there was going to be a fist fight. Vinson Ruff is going to tell you that as well. You're going to see where everybody was on that video. And then you're going to see the [appellant] chose to take out a gun and shoot Christopher. You're

going to hear that what Cecil chose to do was run out like any other brother would when they hear shooting and they know their brother is on the patio. Unfortunately, that choice resulted in Cecil's death as well.

The [appellant] knew that they were brothers, he knew that they were together. He saw both of them earlier in the night and he close to shoot him over anybody else that was out there on that patio. You'll see from that video there were a lot of people out there, but the people he chose to shoot were brothers and that they both ended up dead.

You're going to hear from everybody who saw this and you're going to hear from everybody who was out on that patio and they're all going to lead you to the same conclusion, that the reason Christopher and Cecil aren't here with us today is because the [appellant] made a choice.

At the end of this, I'm going to ask you to find him guilty of capital murder. Thank you.

Prosecution's Case-in-Chief

Trial Testimony of James Hicks

James Hicks, Club Copa's owner, testified about the general layout of the club, the location of the club's surveillance cameras, and the efforts Hicks took to prevent individuals from bringing weapons into the club. Hicks said the night of the shooting, he was inside the club, by a DJ booth near the door to the patio, when he heard pops. Hicks said he realized the pops were gunshots when people on the patio started running inside the club. Hicks testified that he saw one of the shooting victims reaching out, like a hug, as though he was trying to grab the shooter. Hicks said he saw the shooter reaching forward with a gun and saw him shoot the victim. Hicks said the shooter was wearing a gray t-shirt and gray pants. Hicks testified he

could identify the shooter, and his face, but only because of his clothing and "the camera."[2] The prosecutor did not, however, ask him to do so.

Hicks testified that after the shooting he immediately called 911. Hicks said he did not give any details during the 911 call about what he had seen, but indicated he gave details when detectives responded. When police arrived at the crime scene, Hicks also gave them video from his club's surveillance cameras. According to Hicks, police never asked him to go the police station for an interview.

After the prosecutor concluded her direct examination of Hicks, appellant's counsel questioned Hicks outside the presence of the jury in an effort to discredit Hicks's claim that he told police he witnessed Cecil getting shot. Hicks remained steadfast that he told detectives on the night of the shooting what he had seen. Hicks could not explain why none of the police reports reflected that Hicks had witnessed the shooting.

Trial Testimony of Orlando Gardner

At trial, Gardner testified about the altercation between Chris and appellant inside the bar when appellant accidently knocked Chris's drink from his hand. He said later on the patio, appellant approached Chris and it appeared appellant wanted to fight. Chris then punched appellant, causing him to stumble back. Gardner said appellant started shooting before he had even turned back to face Chris. Gardner acknowledged that he did not actually see appellant

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[2] Hicks's testimony regarding how he was able to identify the shooter was unclear, especially in light of the fact appellant's face was not shown on footage from the surveillance camera on the patio:

Q. Now, if you -- Do you think you'd be able to identify that person that was the shooter if he were in the courtroom today?
A. Only due to the camera.
Q. Only due to the camera?
A. Yes. But if it was to be seen, I can only identify the clothing.
Q. You can only identify the clothing?
A. Yes. It was a tough situation, yeah.
Q. So you don't know that you could identify his face today?
A. Yes.
Q. You do think you can?
A. Yes, due to the camera.

with a gun, but Gardner claimed he did see where the shots had come from. Gardner said appellant was the only person in the vicinity.

On cross-examination, Gardner admitted that, immediately after the offense, he told police his eyes were fixed on appellant and he did not see appellant shoot. Garner also admitted he told police he did not see how appellant "got off a face shot stumbling back after he had been hit."

Trial Testimony of Vinson Ruff

At trial, Vinson Ruff testified that, on the night of the offense, he went to Club Copa with appellant to drink and meet women. When they arrived, appellant became involved in a verbal altercation with Chris when Chris spilled his drink and blamed appellant. Ruff said Cecil intervened and helped to diffuse the conflict, but shortly thereafter, when the men were all outside on the nightclub's patio, appellant and Chris again argued about the incident. The dispute turned physical when Chris punched appellant. Ruff testified appellant then pulled out a gun and shot Chris. Ruff said he then ran inside the club where he also witnessed Cecil being shot. Ruff testified he did not see the shooter, but he knows the shots came from behind him.

Ruff testified he did not see appellant again that night, but that the next day, appellant told Ruff he wanted to go intimidate two of the women they had met the night before. Ruff had obtained the phone number of one of the women, who introduced herself as Nisha. Ruff called Nisha and arranged to go with appellant to her apartment. Ruff said when they got to Nisha's apartment, Nisha was there with her female friend and appellant threatened to kill both women if they talked to police.

On cross-examination, Ruff admitted he was on deferred adjudication probation and had four pending felony charges, all of which the State alleged occurred while he was on probation. Ruff also admitted that the reason he came forward as a witness was because police had

identified him as a suspect and were looking for him at Ruff's mother's house. Ruff also acknowledged that when he first came forward, he told police he never saw appellant with a gun that night. Ruff said he lied because he was afraid of appellant. During cross-examination, Ruff admitted: 1) he told police he could read lips; 2) he was in appellant's neighborhood the day after the shooting; and 3) he "saw" appellant confess to the shooting.

Trial Testimony of Dateisha Ross

Dateisha Ross testified she went to Club Copa on the night of the shootings with her roommate Jonisha Johnson. Ross said she and Jonisha met two men that night, "Big Daddy" and "Big Daddy's friend." Ross identified appellant as Big Daddy. Ross said that, at one point in the evening, she danced with appellant. While they were dancing, appellant lifted up his shirt and Ross saw he had a gun tucked in his pants. After she saw the gun, Ross avoided appellant for the rest of the evening.

The following day, Jonisha invited appellant and his friend to Ross and Jonisha's apartment. Ross said they talked about the shooting and appellant admitted he did "it." Specifically, appellant said he was in a conflict with one of the brothers, who tried to fight him, and he shot him. Ross denied that appellant made any threats to the two women. However, appellant did proclaim that nobody would talk because he was Big Daddy. On cross-examination, Ross admitted she had a pending felony drug offense which she was hoping to "catch a break" on.

Trial Testimony of Detective Tommy Raley

Detective Tommy Raley testified he was the lead detective assigned to investigate the murders. Raley interrogated appellant after his arrest. Appellant's recorded statement was admitted into evidence over appellant's objection. The videotape of the statement shows that appellant admitted being at Club Copa on the night of the offense and that he was involved in a

dispute with a man at the bar who had dropped his drink. Appellant repeatedly and adamantly denied that he shot anyone.

However, later in the interrogation, appellant told Raley that two guys jumped him and he "started shooting." Appellant said he was by the DJ booth and that he used a 9 mm gun. When asked how he was able to get the gun through security at the club, appellant told Raley he put it in his shoe, underneath his foot. After inculpating himself as the shooter, appellant then retracted his confession and again denied shooting anyone.

Appellant's Case-in-Chief

Trial Testimony of Detective Colleen Shin

Appellant called homicide Detective Colleen Shin as a witness. Shin said the night of the shootings, she spoke to Hicks only about obtaining the surveillance camera footage. Shinn testified that if Hicks had told her that he witnessed the shooting, she would have put it in her report. Shinn also said if Hicks had told another officer he had witnessed either shooting, the officer should have included it in a written report.

Objection to Prosecutor's Violation of Pretrial Discovery Order

Before the trial court's charge was read, appellant directed the trial court to the pretrial discovery order. Appellant specifically focused on the provision that required the State to produce "[a]ny statements by any party or witness to [the] alleged offense in the State's possession or within its knowledge, including any law enforcement agency, whether such statements were written or oral, which might in any manner be material to either Defendant's guilt or innocence or punishment, if any." Appellant complained the State violated the order because he was neither given any notice that Hicks would provide eyewitness testimony nor given a rendition of his eyewitness account. In response, the prosecutor informed the trial court that the statement appellant was referring to was made to her personally during a witness

interview and was "work product," not a statement made to law enforcement. The trial court denied appellant's requests.

D. Verdict

The jury subsequently found appellant guilty of capital murder, finding he knowingly and intentionally caused the deaths of both victims by shooting them with a firearm. As a result, the trial court assessed punishment at life imprisonment with no possibility of parole.

E. Motion for New Trial

Appellant filed a motion for new trial again complaining of the State's violation of the court's pretrial discovery order. At a hearing on the motion, the same prosecutor who tried the case appeared. She did not attempt to proffer any further explanation as to why she did not produce Hicks's statement to appellant. Instead, she asserted appellant failed to show Hicks's testimony was material. She further asserted the testimony was not harmful because appellant had confessed to the offense. The trial court denied appellant's motion.[3] This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

We begin by addressing appellant's ninth issue in which he challenges the sufficiency of the evidence to support his conviction. In reviewing a legal sufficiency challenge, we examine all of the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013). The jury, as trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *See Jackson*, 443 U.S. at 326. The jury is free to draw reasonable inferences from the evidence. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). Every fact need not point directly and independently to the defendant's guilt.

[3] The judge who presided over the motion for new trial hearing was not the judge who presided over the jury trial.

Vanderbilt v. State, 629 S.W.2d 709, 716 (Tex. Crim. App. 1981). If the record supports conflicting inferences, we presume the jury resolved those conflicts in favor of the verdict, and we defer to that determination. *McKay v. State*, 474 S.W.3d 266, 270 (Tex. Crim. App. 2015).

A person commits murder if he intentionally or knowingly caused the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011). A person commits capital murder if he murders more than one person during the same criminal transaction. *Id*. at § 19.03(a)(7)(A) (West 2011).

In this issue, appellant generally complains that the only evidence to support his conviction was the testimony of James Hicks and Vinson Ruff, which he contends was not reliable or credible. Appellant also complains their testimony was inconsistent with the physical evidence, specifically the location of the shell casings found at the scene. Appellant's sufficiency complaint, on its face, asks that we second-guess the jury's assessment of the credibility of the witnesses and reweigh the evidence. We are not permitted to do so. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007); *Moreno v. State,* 755 S.W.2d 866, 867 (Tex. Crim. App. 1988) (en banc). We conclude appellant has failed to show the evidence is legally insufficient to support his conviction. We resolve the ninth issue against appellant.

III. VIOLATION OF PRETRIAL DISCOVERY ORDER

In his first issue, appellant asserts he is entitled to a new trial because the prosecutor willfully withheld James Hicks's and Vinson Ruff's oral statements in violation of the plain terms of the discovery order. When a prosecutor willfully withholds evidence in violation of a discovery order, exclusion of the evidence is the proper remedy. *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006). Exclusion of evidence in this context is in the nature of a "court-fashioned sanction" for prosecutorial misconduct. *See Francis v. State*, 428 S.W.3d 850, 854-55 (Tex. Crim. App. 2014). In other words, even though lesser remedies might suffice to

cure harm, exclusion is required if the record shows the prosecutor intentionally violated the order in a calculated effort to frustrate the defense. *See Oprean*, 201 S.W.3d at 728.

We review a trial court's refusal to exclude evidence the State withheld from a defendant in violation of a discovery order for an abuse of discretion. *Francis*, 428 S.W.3d at 855. When the trial court makes findings of fact "based on an evaluation of credibility and demeanor," we "should show almost total deference" to those findings. *Oprean*, 201 S.W.3d at 726. When the trial court does not make findings of fact, we "view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record." *Id.*

The trial court's discovery order required the State to produce "[a]ny statements by any party or witness to this alleged offense in the State's possession **or** within its knowledge, including any law enforcement agency, whether such statements were written **or** oral, which might in any manner be material to either Defendant's guilt or innocence or punishment, if any." (emphasis added).[4] The State agreed to the terms of the discovery order.

Prior to trial, the prosecutor produced the statements police obtained from witnesses during the investigation. Based on those reports, no witness actually saw who fired the shots that killed either Chris or Cecil. The police reports also reflected that Hicks was at the club on the night of the shooting and showed police the surveillance tape that night. Nothing in the reports suggested Hicks had personally witnessed anything relevant to appellant's guilt or innocence.

[4] Article 39.14 of the Texas Code of Criminal Procedure contains provisions regarding discovery in criminal cases. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14. At the time of the offense in this case, article 39.14 required a defendant to file a motion and obtain an order from the trial court in order to obtain discovery from the State. Appellant did so. On January 1, 2014, the Legislature enacted the Michael Morton Act amending article 39.14. See Michael Morton Act, 83rd Leg., R.S. ch. 49, § 3, 2013 Tex. Sess. Law Serv. 1611 (codified as Tex. Code Crim. Proc. art. 39.14). The Act significantly changed Texas law related to discovery in criminal cases in order to prevent wrongful convictions by ensuring defendants have access to the evidence in the State's possession so that they may prepare a defense. *See id*; *see also* Sponsor's Statement of Intent, Bill Analysis, C.S.S.B. 1611, (available at http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/SB01611S.pdf); *Ex parte Pruett*, 458 S.W.3d 537, 542 (Tex. Crim. App. 2015) (Alcala, J, dissenting). The Act only applies to offenses committed on or after its effective date and is therefore inapplicable here.

At trial, however, Hicks testified: (1) he actually witnessed Cecil being shot; (2) that it occurred inside the club; and (3) that he could identify the shooter. Hicks also claimed he had given an oral statement to that effect to police. At the end of trial, before the jury charge was read, appellant moved to strike Hicks's testimony or grant a mistrial because appellant had no notice Hicks would testify as an eyewitness to the offense and appellant was given no rendition of the substance of Hick's testimony. The prosecutor's only response was that "[t]he statements . . . that he's referring to that we did not turn over are statements that [Hicks] made to [her] in a witness interview. There is case law that makes it very clear that an interview that is conducted with the District Attorney and [her] notes are work product, they are not statements made to law enforcement." The trial court denied appellant's request without making any findings as to the prosecutor's intent, stating only, "Well, at this point, I'm going to overrule it and go with what we've got."

In this issue, appellant complains the trial court abused its discretion by failing to either strike Hicks's testimony or declare a mistrial. Appellant also contends the trial court should have struck Vinson Ruff's testimony and/or granted a mistrial because he had no notice Ruff would identify appellant as the shooter. We begin by noting that, at trial, appellant did not contend the prosecutor failed to produce a statement made by Ruff. Nor does the record show the prosecutor obtained and failed to disclose any statements made by Ruff. In contrast, the prosecutor admitted Hicks made a statement to her and that she withheld it. Thus, we limit our review to the prosecutor's failure to disclose Hicks's statement.

The State responds appellant waived his complaint because he did not object at the time Hicks testified. Rule 33.(a)(1)(A) of the Texas Rules of Appellate Procedure provides that "[a]s a prerequisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion[.]" TEX. R. APP.

P. 33.1(a)(1)(A). To be timely, an objection must be made as soon as the basis for the objection becomes apparent. *Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997); *Wilson v. State*, 44 S.W.3d 602, 606 (Tex. App.—Fort Worth 2001, pet. ref'd).

Here, Hicks testified at trial that he witnessed the second shooting and that he also told police what he had witnessed. When faced with this testimony for the first time at trial, appellant's response was to accuse Hicks of perjury because none of the police reports showed he had made such a statement. However, over the course of trial, appellant was unable to definitively establish whether or not Hicks had told police what he observed.[5] Nevertheless, at the end of trial, the prosecutor took the position that Hicks did not make the statement to police, as he had unequivocally testified. Instead, the prosecutor asserted Hicks made the statement to her personally, not to "law enforcement." It was only then that it became apparent that Hicks had in fact made a prior statement, that the prosecutor *knew* Hicks had made a statement, and that she had intentionally withheld it. We conclude appellant preserved his complaint for review. *See Lagrone,* 942 S.W.2d at 618.

The State next asserts the prosecutor did not disobey the discovery order because a prosecutor's notes from witness interviews are not witness statements, as defined by Texas Rule of Evidence 615. TEX. R. EVID. 615. Rule 615 defines the types of witness statements that must be produced at trial for purposes of cross-examining the witness. *Id*. It requires production of only certain written and recorded statements in the State's possession. *Id.*

We agree with the State that a prosecutor's notes are not a "witness statement" under Rule 615. Nor are oral statements witness statements under that rule. *See id.* But that is beside the point. The discovery order unambiguously required the State to produce *oral* statements

[5] The police officers the State called at trial said they did not recall Hicks saying he witnessed it, but left open the possibility that he had done so.

made by any party or witness to the offense. Hicks's oral statement in which he gave the prosecutor an eyewitness account of the shooting fell squarely within the terms of the discovery order.

The State next asserts that, even if the prosecutor violated the order, she did not do so willfully because she believed her actions were proper. We disagree. In *Oprean*, the trial court signed a discovery order that required the State to produce, prior to trial, all video and tape recordings that contained the defendant's voice. *Oprean*, 201 S.W.3d at 725. After the jury found the defendant guilty, the prosecutor informed the defendant of her intent to present a videotape of the appellant's prior DWI arrest during the punishment phase. *Id*. at 725. The defendant objected to admission of the videotape because the prosecutor had violated the discovery order by failing to produce it. The only explanation the prosecutor offered was that there was no "article 37.07(g) charge in the Court's discovery order." In determining whether the prosecutor offered a valid reason for her failure to comply with the terms of the discovery order, the Court of Criminal Appeals looked to the prosecutor's explanation in light of the plain terms of the discovery order. The Court concluded that her explanation was not valid. It first noted that "[t]he plain wording" of the order would be clear to "anyone who can read." *Id*. at 727. The order required the production of all tapes containing the defendant's voice; it "did not mention anything about Article 37.07, and therefore was not limited by that provision." *Id*. at 727-28. The Court concluded that the prosecutor's reliance on a nonexistent limitation evidenced her conscious decision to violate the terms of the order. *See id.*at 728. The Court held the trial court therefore abused its discretion in admitting the videotape into evidence. *Id*. We reach a similar conclusion here.

The discovery order required the prosecutor to produce all statements, whether oral or in writing, that the State was aware of, which were material to appellant's guilt or innocence. The

order made no mention of Rule 615 and, on its face, required production of oral statements whereas Rule 615 does not. Nor, in fact, did the prosecutor claim she was relying on Rule 615 when she withheld the statement. Rather, she asserted that Hicks's statement was not made to law enforcement because: (1) it was given to the prosecutor during an interview; and (2) both the interview and the prosecutor's notes were work product. However, the order was not limited to statements made to law enforcement. Nor did it contain an exception for work product. Such an exception would have made little sense. Work product protects an attorney's thoughts and impressions, rather than the underlying factual information. *Pope v. State*, 207 S.W.3d 352, 358 (Tex. Crim. App. 2006). What is clear from the prosecutor's explanation is that her failure to produce Hicks's statement was not based on any language in the order. The prosecutor made a conscious decision not to comply with the order based on an unwarranted and undisclosed claim of work product. As a result, appellant was ambushed at trial. He was unable to prepare a proper defense because appellant was totally unaware of the eyewitness statement that had been made to the prosecutor.

We conclude both the prosecutor's explanation and the record as a whole show the prosecutor consciously disregarded a plain directive in the discovery order and that she did so in order to gain a tactical advantage. *See Oprean*, 201 S.W.3d at 728. The question now is whether admission of Hicks's testimony was harmful.[6] *See id.* We conclude it clearly was.

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[6] In *Oprean*, the Court of Criminal Appeals remanded to the court of appeals to determine what harm, if any, was caused by "the videotape's *admission* into evidence." *Id.* at 728 (emphasis added); *see also Hollowell v. State*, 571 S.W. 2d 179, 180 (Tex. Crim. App. [Panel Op.] 1978) (defendant was not harmed by "admission" of evidence withheld in violation of discovery order). On remand, the Houston court limited its review to the harm caused by the State's violation of the discovery order, *i.e*., the appellant's inability to prepare a defense to the evidence that should have been disclosed. *Oprean v. State*, 238 S.W.3d 412, 415 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (op. on remand); *see also Hall v. State*, 283 S.W.3d 137, 164 (Tex. App.—Austin 2009, pet. ref'd). It did so because the error did not concern the substantive admissibility of the evidence. *Oprean*, 238 S.W.3d at 415. The Houston Court did not consider that the rationale for exclusion under these circumstances is to sanction the State, not to cure the harm a defendant suffers as a result of the State's violation. It is for that reason that a trial court is required to exclude evidence the State willfully withholds in violation of a discovery order even if a continuance could have cured any harm the defendant suffered as a result of its violation. *Francis*, 428 S.W.3d at 856 (concluding continuance proper remedy when violation of order was not willful).

To prove appellant was guilty of capital murder, the State was required to prove appellant knowingly and intentionally caused the deaths of *both* Chris Ferguson and Cecil Ferguson. According to the State, Hick's testimony was harmless because appellant confessed to Raley during his videotaped interrogation; specifically, appellant told Raley the two victims "jumped him" and he "just started shooting." At trial, appellant argued that his confession was not reliable because it was made only after police officers suggested he claim self-defense to avoid a conviction for capital murder. Appellant also argued his inculpatory statements were not consistent with the physical evidence, which indicated both victims were shot on the patio. The State, however, relied on Hicks's testimony to show Cecil was shot inside the club and thus to show appellant's confession was reliable. The State also relied on Hicks's testimony to show appellant pointed a gun at Cecil and fired the shot that killed him, which showed appellant not only caused Cecil's death, but also that he had the requisite intent when he did so. We conclude Hicks's testimony was key to the State's theory of guilt and was, therefore, harmful.

This Court believes both the evidence in this case and the prosecutor's explanation for withholding eyewitness testimony support an inference of a willful violation of the trial court's discovery order, but even if the prosecutor's conduct in withholding the statement had been less culpable, our result would be the same. Negligent or reckless failure to produce evidence in violation of a discovery order does not, standing alone, require exclusion of evidence. *Francis*, 428 S.W.3d at 855. However, it "may call for the exclusion of evidence if the appellant suffers some disability by virtue of the lack of discovery and the trial court takes no timely corrective action." *Id.* at 855 n.8 (citing *State v. LaRue*, 152 S.W.3d 95, 97 (Tex. Crim. App. 2004)).

Here, appellant prepared his defense with the understanding that the State was in compliance with the discovery order, to which it had agreed. Therefore, appellant prepared a defense based on the belief that the State did not have a single witness who could place a gun in

appellant's hand at the time of the shootings. Before the trial began, it appeared the State's case would be based on a videotape the State claimed showed appellant shooting Chris and based on admissions appellant made after the shooting. Appellant prepared a defense to *that* case. At trial, the State ambushed appellant by presenting a case that depended on the eyewitness testimony of James Hicks. Appellant heard that testimony for the very first time as it unfolded on the witness stand, nearly two-and-a-half years after the shooting. We conclude appellant could not have effectively prepared for trial with no knowledge that such a critical eyewitness statement existed. We further conclude that the prejudice appellant suffered was not such that it could have been cured by a continuance. Because of the prosecutor's conduct in this case, appellant's trial attorney could neither properly advise appellant with respect to the State's plea offers nor advise appellant as to whether he should raise any defensive issues.

We conclude appellant was prejudiced by the State's violation of the discovery order. We conclude there was no timely corrective action the trial court could have taken to cure such prejudice. We therefore sustain appellant's first issue.

Because of our disposition of this issue, we need not consider appellant's remaining issues. We reverse appellant's conviction and remand to the trial court for a new trial.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JEROME DEAMUS, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas
No. 05-15-01182-CR V.	Trial Court Cause No. F13-56260-L.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Brown. Justices Fillmore and O'Neill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED** and the cause **REMANDED** for a new trial.

Judgment entered this 22nd day of August, 2017.