IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	)	
	)	
	)	**C.R. No. 05031801**
vs.	)	
	)	
SHANNON THOMPSON,	)	
	)	
Defendant.	)	

Submitted September 20, 2005
Decided September 26, 2005

Carole E.L. Davis, Esquire, Deputy Attorney General.
Edward C. Gill, Esquire, counsel for Defendant.

DECISION AND ORDER ON DEFENDANT'S MOTION FOR SANCTIONS AND DEFENDANT'S MOTION FOR MISTRIAL

Trial in the above-captioned matter commenced on September 20, 2005. During the trial, evidence was presented to the jury, which caused the Defendant to request sanctions against the State for failing to disclose the evidence prior to trial. Additionally, the Defendant requested that this Court order a mistrial. The Court continued the trial and ordered that the parties submit briefing on their respective positions. After hearing the parties' arguments outside of the jury's presence, and reviewing the briefs subsequently submitted, the Court finds and determines as follows.

BACKGROUND

On September 20, 2005 a trial was initiated against Shannon Thompson (hereinafter, "Defendant") on one charge of violation of 11 *Del. C.* § 1335(a)(1),

Violation of Privacy. The charge stems from an incident that allegedly occurred at the "Brew Ha Ha" café in Rehoboth Beach, Delaware on March 19, 2005. The State alleges that the Defendant was present in the men's room at the establishment and that while a fifteen-year-old female was in the women's room, the Defendant climbed up into the area above the ceiling tiles in the men's room so that he could hear and see into the women's room.

The investigating officer, Detective O'Bier, was the final witness called in the State's case-in-chief. On cross examination, defense counsel asked the Detective whether he had ever witnessed another individual attempt to climb up to the ceiling tiles in the Brew Ha Ha men's room, without using a ladder. Detective O'Bier testified that he had witnessed the the prosecuting Deputy Attorney General ("DAG") attempt to climb through the ceiling tiles at the crime scene. The Detective stated that the DAG failed to reach above the ceiling tiles. Thereafter, the parties requested a sidebar and the Court removed the jury.

Upon further questioning of the witness outside the hearing of the jury, the Detective informed the Court that he did not actually witness the DAG's attempt in the Brew Ha Ha men's room. Rather, he observed her attempt to complete a similar climb in the restroom of the Attorney General's Office several months earlier, and had misspoken in his testimony However, the DAG candidly admitted that she indeed attempted to gain access to the area above the ceiling tiles at the crime scene on the day before the trial in the presence of another witness, Pfc. Ladd. The DAG informed the Court, outside of the hearing of the jury, that she successfully climbed to the area above the ceiling when she made the attempt at the crime scene.

The Defendant requests that this Court dismiss the case as a sanction against the State for failing to disclose the DAG's attempts to climb into the ceiling tiles. In the alternative, if the case proceeds, defense counsel wishes to call the DAG as a witness to testify as to her personal attempts, and claims such testimony would necessitate a mistrial.

DISCUSSION

The State Did Not Have a Duty to Reveal the DAG'S Failed Attempt to Enter the Ceiling Area to the Defendant

The Defendant argues that the DAG's attempts were at least partially exculpatory and thus constituted *Brady* material. Accordingly, he claims that the State had a duty to disclose the results of the attempts before trial. Additionally, the Defendant states that the information was discoverable pursuant to this Court's criminal Rule 16(a)(1)(D) and that the State's failure to produce the results of the attempts constituted a violation of this Rule. The DAG disagrees with each of the Defendant's contentions, claiming that her attempts merely constituted trial preparation and were, therefore, specifically excluded from discovery pursuant to Criminal Rule 16(a)(2). For the following reasons, the Court concurs with the State and finds that the State did not have a duty to disclose the circumstances and results of either attempt.

It is clear, after hearing the State's argument at sidebar, that the DAG prosecuting this case engaged in two separate attempts to test its theory of the case. Namely, that the Defendant used the facilities in the restroom itself to gain access to the area above the ceiling tiles without any assistance from a free-standing form, like a ladder. The first incident occurred in the presence of Detective O'Beir in a restroom at the Attorney General's Office. The Detective

correctly testified before the jury that the DAG failed in this first attempt to reach the ceiling tiles. The DAG made a second attempt at the crime scene on the day prior to trial. According to the DAG, she was able to gain access to the area above the ceiling tiles at the crime scene, and grab onto the "divot" in the drywall separating the mens' and womens' rooms, despite the facts that she is considerably smaller in height and weight than the Defendant. The DAG did not attempt to then pull herself up into the ceiling to observe into the women's room, as the State alleges the Defendant did. Consequently, the DAG's attempt at the crime scene was successful in establishing her theory of the case, as far as it went.

With respect to the first attempt, the Court finds that the attempt did not constitute *Brady* evidence. The State has a special duty to disclose evidence that would exculpate a defendant. *Brady v. Maryland*, 337 U.S. 83, 87 (1963). The State, however, has no duty to reveal evidence which is not exculpatory in nature. *Liket v. State*, 719 A.2d 935 (Del. 1998). Exculpatory evidence is defined as evidence that is favorable to the defendant and material to guilt or punishment. *Brady* at 87. Evidence is material under the *Brady* rule when there is a reasonable probability (more than a mere possibility) that the evidence would influence the jury's decision if it were disclosed. *U.S. v. Ryan*, 153 F.3d 708, 712 (8th Cir., 1998)(citing, *Kyles v. Whitely*, 514 U.S. 419, 433-34, 115 S.Ct. 1555 (1995); and *U.S. v. Bagley*, 473 U.S. 667, 682 (1985).

The DAG's first attempt to test her theory of the case was unsuccessful. Thus, the Defendant accurately reflects that the nature of the State's first attempt had some exonerating quality. However, this Court finds that the test itself was

not material to the issue of the Defendant's guilt or innocence as promulgated in *Brady* and its progeny. The first attempt did not occur at the crime scene. Instead, the DAG attempted to climb up to the ceiling using an entirely different facility. Additionally, the DAG is so different in physical size and stature from the Defendant that her failed attempt has little, if any, possibility of convincing the jury that the Defendant could not have attempted the climb at the actual crime scene. Because there is no reasonable probability that the evidence of the first attempt would influence the jury's decision, the first attempt was immaterial under *Brady*. Therefore, the State had no duty to disclose the first attempt under the *Brady* rule.

The State also had no duty to disclose the second attempt. As discussed above, the State is not obligated to reveal evidence that is not exculpatory. *See Liken*, *supra*. The fact that the DAG was able to successfully gain access to the area above the ceiling at the crime scene, using only the facility itself, and grab onto the drywall separating the men's' and women's is not exculpatory in nature; rather it tends to be inculpatory. Because the second attempt was not exculpatory, it was not discoverable under *Brady* and the State had no duty to reveal the attempt to the Defendant prior to trial.

The Defendant also contends that the State had a duty to disclose the evidence pursuant to this Court's rules governing discovery. In his memorandum, defense counsel argues that the State's attempts amounted to an experiment or test, the results of which are discoverable. *See* CCP. Crim. R. 16(a)(1)(D). The State characterizes the attempt as an internal investigation of the case, which is not subject to disclosure. *See* CCP Crim. R. 16(a)(2)(D). Due

to the circumstances and the nature of the DAG's first attempt, the Court finds that the attempt was not a scientific test or experiment and contemplated under the Rule. Rather it constitutes the internal thought process of the DAG, which is privileged under the Rule.

Rule 16(a)(1)(D) states that the results of "scientific test or experiments" are discoverable. The Court takes notice that the Rule specifically qualifies discoverable tests and experiments as scientific in nature. In support of his position that the DAG's attempts constituted tests or experiments under the Rule, the Defendant directs this Court's attention to the case of *U.S. v. Ryan*. *Supra* at 710. In *Ryan*, the prosecutor failed to disclose the results of a demonstration in which the investigating fire officials tested different chemicals on materials from the crime scene in an arson case. *Id*. The demonstration conducted in *Ryan* was clearly scientific. Unlike the demonstration in *Ryan*, neither attempt committed by the DAG in the case at issue was scientific, but were lay reenactments. This is evidenced by the fact that the DAG did not make either attempt with a person of similar build, weight or strength as the Defendant. The Court finds that the DAG committed each attempt to develop her own thought process in preparing the case for trial. As stated in Rule 16(a)(2) and relevant case law, evidence of the State's internal investigation and development of the prosecutor's thought process is not subject to disclosure. *See State v. Capano*, 1998 WL 729791 (Del. Super.); *State v. Cheng Wo Wa*, 1971 WL 125403.

For the foregoing reasons, the State did not have a duty to disclose either its first attempt at a restroom in the Attorney General's Office, nor did the State have a duty to reveal its second attempt at the crime scene. Therefore, the State

did not act inappropriately and the Defendant's motion for sanctions is hereby denied.

A Mistrial is Not Required

At the sidebar, defense counsel stated that if the trial continues, he intends to call the DAG as a witness. The Delaware Rules of Professional Conduct provide that a lawyer may not act as an advocate at a trial in which the lawyer is likely to be a necessary witness. Prof. Cond. R. 3.7. Consequently, if the Defendant is permitted to call the DAG as a witness, she will be disqualified and a mistrial would then be appropriate.

To disqualify an attorney in a case, the moving party bears the burden of demonstrating that there is a reasonable likelihood that the attorney will be a necessary witness. *Shipley v. Schlecker*, 2002 WL 32072579 (Del. Com. Pl.). The Defendant contends that the DAG is a necessary witness because her testimony would show that on at least one occasion, she made a failed attempt to test her theory of the case. The Defendant also states that because there was some discrepancy between Detective O'Bier's testimony and the DAG's recollection of events, the DAG's testimony is necessary for the jury to appropriately weigh the Detective's credibility. If the DAG is disqualified, the Defendant asks this Court to grant its request for a mistrial. A mistrial is necessary only when there are no meaningful and practical alternatives to that remedy. *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994). In light of the severe remedy requested, the Court will examine the evidence that was presented to the jury, the reasonable likelihood that the DAG would be a necessary witness and any alternative remedies that may cure the effect of the Detective's testimony.

The evidence that was presented to the jury amounted to the Detective testifying that he observed the DAG try and fail to gain access to the area above the ceiling tiles at the crime scene, without assistance from a ladder. As discussed *supra*, the attempts conducted by the State were work product information and thus not subject to discovery. However, such information was inadvertently solicited by defense counsel on cross-examination. The evidence heard by the jury was not prejudicial to the Defendant. If anything, the Detective's testimony regarding a failed attempt is favorable to the defense. Accordingly, the Court cannot find that the Defendant has been prejudiced by Detective O'Bier's testimony.

Because this Court found that evidence of the DAG's attempts constituted work product, it would not be appropriate for the Defendant to call the DAG to testify as to those attempts. The Defendant argues that the DAG would be a necessary witness to impeach the Detective's testimony. However, the Court finds that the Detective erroneously responded to the defense's question about whether he observed anyone else try to "step on the toilet, handicap bar and jump up and hold onto the drywall." The question clearly requested whether the witness observed a recreation at the scene of the crime. The officer testified he observed such a recreation. The officer testified outside of the hearing of the jury, and the DAG confirmed, that he was not present for that crime scene recreation, and mistakenly testified otherwise. Inasmuch as the attempt the officer observed was at a different facility as set forth above, and was inadmissible attorney work-product, the Court finds that the Detective's testimony regarding this attempt is both irrelevant and privileged. To avoid

confusion of the jury, the Court shall strike from the record the Detective's testimony regarding the DAG's attempt he observed, and shall instruct the jury to disregard the testimony and give it no consideration in its deliberations. The Court shall not permit the Defendant to call the DAG to the stand to examine her about her attorney work-product trial preparation attempts to recreate her theory of the case. For these reasons, the Court finds that the DAG will not be a necessary witness. Accordingly, mistrial is inappropriate.

CONCLUSION

For the foregoing reasons, the Defendant's motion for sanctions and motion for mistrial are hereby **DENIED.**

IT IS SO ORDERED, this ____ day of September 2005.

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Kenneth S. Clark, Jr., Judge