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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

THOMAS McDUFFIE, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D16-294

Opinion filed December 20, 2017.

Appeal from the Circuit Court for Sarasota County; Debra Johnes Riva, Judge.

Jaime J. Garcia, III, of Garcia Law Group, P.A., Tampa, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Kiersten E. Jensen, Assistant Attorney General, Tampa, for Appellee.

KHOUZAM, Judge.

Thomas McDuffie appeals his judgment and sentences for possession of heroin with intent to sell or deliver (count one), possession of cocaine with intent to sell or deliver (count two), resisting, obstructing, or opposing an officer without violence (count three), and driving while his license was revoked as a habitual traffic offender (count four). Though Mr. McDuffie raises five issues on appeal, we address only the

issue regarding the Richardson[1] violation. Because we are unable to conclude that the State's willful discovery violation was harmless, we reverse and remand for a new trial.

About a month before trial, the defense filed its first motion for continuance. In the motion, defense counsel requested that Mr. McDuffie's trial be moved from the September 2015 trial period to the November 2015 trial period. Defense counsel informed the trial court that she had a capital sexual battery trial scheduled to begin about a week before Mr. McDuffie's trial. She further informed the trial court that Mr. McDuffie's right to a speedy trial had been waived. The assistant state attorney stipulated to the continuance, but the trial court still denied the motion.

On September 11, 2015, the State filed its notice of intent to call Officer Howell as an expert witness in "street level drug sales." This disclosure was made thirteen days before trial began and six weeks after the court-imposed discovery deadline.[2] The disclosure was also made "right before" defense counsel was scheduled to start her capital sexual battery trial.

On the day of trial, before voir dire began, defense counsel moved to continue the trial based on the State's late disclosure of its expert witness. Consequently, the trial court conducted a Richardson hearing to determine whether there was a possible discovery violation. Defense counsel argued that there was a discovery violation because the State failed to disclose Officer Howell within the timelines set by the trial court. Defense counsel further contended that because the

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[1]Richardson v. State, 246 So. 2d 771 (Fla. 1971).

[2]We note that the State also failed to disclose a number of other items in a timely manner. However, we need not address those late disclosures.

disclosure was late, she was not prepared for trial as she still needed to depose Officer Howell.

In response, the State conceded that the disclosure of its expert witness was late. The State nevertheless argued that the trial court should not grant the continuance because the defense had known about Officer Howell for thirteen days and still failed to take any action in preparation for his testimony. The State further contended that because defense counsel had failed to depose any of its witnesses due to Mr. McDuffie's financial constraints, the defense could not prove that it suffered any procedural prejudice. The State also informed the trial court that Officer Howell's testimony was "necessary . . . or at least very helpful" in order to prove that Mr. McDuffie had the intent to sell or deliver the drugs allegedly found on or near his person.

But defense counsel insisted that she was unprepared for trial and that granting a continuance based on the Richardson violation would allow her to depose Officer Howell. She also maintained that she would potentially call her own expert witness to refute Officer Howell's proposed testimony. Defense counsel further argued, among other things, that she did not have an opportunity to depose Officer Howell in the thirteen days preceding trial because she was in trial and had been travelling across the country. And though defense counsel admitted to not taking any depositions due in part to Mr. McDuffie's financial constraints, she asserted that it was not "necessary in this particular case" to take depositions because her "strategy" was based on the State's lack of "tangible evidence." She assured the trial court that Mr. McDuffie now had the funds to depose Officer Howell.

After hearing the parties' arguments, the trial court determined that the State's late disclosure of Officer Howell was a willful discovery violation as there was "no way the defense could [have] know[n] about this potential witness." However, the trial court found that the defense was not procedurally prejudiced by the violation. The trial court reasoned that because the defense had known of the expert witness for about two weeks and had failed "to set up a deposition or talk to [its] own experts or file a motion" during that time period, it was "deny[ing] the motion for continuance based on [the] Richardson violation." The trial then ensued, and Officer Howell testified as expected. The jury returned a guilty verdict on all counts. This appeal followed.

Once the trial court conducts a Richardson hearing and finds that there was a discovery violation, "the appellate court must apply a special harmless error test[.]" Charles v. State, 903 So. 2d 314, 317 (Fla. 2d DCA 2005) (citing State v. Schopp, 653 So. 2d 1016, 1020-21 (Fla. 1995)). This test "does not focus on the discovery violation's effect on the verdict." Muniz v. State, 988 So. 2d 1194, 1197 (Fla. 2d DCA 2008) (citing Scipio v. State, 928 So. 2d 1138, 1149 (Fla. 2006)). Rather, the inquiry "focuses on 'whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense.' " Id. (quoting Charles, 903 So. 2d at 317). The defense is presumed procedurally prejudiced if "there is a reasonable possibility that the discovery violation 'materially hindered the defendant's trial preparation or strategy.' " Id. (quoting Scipio, 928 So. 2d at 1150). "[O]nly if the appellate court can determine beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." Id. (alteration in original). Where the State commits a discovery violation, the State has an "extraordinarily high"

burden to show that the error was harmless. See id. (quoting Scipio, 928 So. 2d at 1149); Ward v. State, 165 So. 3d 789, 792 (Fla. 4th DCA 2015).

Here, we are unable to conclude beyond a reasonable doubt that the willful discovery violation was harmless. Had the State timely informed the defense of its intent to call Officer Howell as an expert witness, there is a reasonable possibility that the defense's trial preparation would have changed. For instance, the record reveals that the defense would have deposed Officer Howell prior to trial and possibly called its own expert witness to refute Officer Howell's opinion regarding the packaging and weight of the drugs. The record also reflects that the defense may have consulted with its own expert witness to further investigate Officer Howell's proposed testimony and determine which questions it should ask Officer Howell regarding his qualifications or conclusions. Such potentially beneficial courses of action were materially hindered by the State's late disclosure, especially considering that defense counsel had other obligations at the time of disclosure. Indeed, defense counsel maintained repeatedly that she was unprepared for trial and that her ability to defend her client was hampered by the State's late disclosure. As a result, we cannot determine that Mr. McDuffie was not procedurally prejudiced by the late disclosure. See Muniz, 988 So. 2d at 1197-98 (reversing and remanding for a new trial where the State's inadvertent failure to timely disclose its intent to call a potential rebuttal witness "may have changed [the defense's] strategy"); Suda v. State, 838 So. 2d 665, 666 (Fla. 1st DCA 2003) (concluding that the State's untimely disclosure of its intent to call a witness at trial was not harmless error because it could have changed the defendant's trial strategy).

Therefore, we must reverse and remand for a new trial.

Reversed and remanded.

VILLANTI, J., and CASE, JAMES R., ASSOCIATE SENIOR JUDGE, Concur.