STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 30, 1999
v	No. 204810 Oakland Circuit Court
SHANNON T. JAMISON, Defendant-Appellant.	LC No. 96-146293 FC

Before: Fitzgerald, P.J., and Doctoroff, and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of delivery of 225 to 649 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), for which he was sentenced to twenty to thirty years' imprisonment. Defendant was originally charged with possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and delivery of 225 to 649 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). We affirm.

First, defendant argues that he was denied a fair trial by the prosecution's loss of the tape recording made by the police informant during the drug transaction for which defendant was convicted. We disagree. We review constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

Due Process requires that criminal prosecutions comport with notions of fundamental fairness. *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528, 2532; 81 L Ed 2d 413 (1984). This means that a criminal defendant must have a meaningful opportunity to present a complete defense. *Trombetta, supra*, 467 US 485; 104 S Ct 2532; 81 L Ed 2d 413. "To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence." *Trombetta, supra*, 467 US 485; 104 S Ct 2532; 81 L Ed 2d 413. In *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194, 1196-1197; 10 L Ed 2d 215 (1963), the United States Supreme Court held that:

> 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.

The *Brady* rule requires the prosecutor to disclose evidence that is favorable to the accused, evidence that if suppressed would deprive the defendant of a fair trial. *United States v Bagley*, 473 US 667, 675; 105 S Ct 3375, 3380; 87 L Ed 2d 481 (1985). The "materiality of the evidence" requirement mandates that the suppressed evidence may have affected the outcome of the trial. *Bagley, supra*, 473 US 674-675; 105 S Ct 3379; 87 L Ed 2d 481. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley, supra*, 473 US 682, 685; 105 S Ct 3383, 3385; 87 L Ed 2d 481 (opinion Blackmun, J.) (White concurring).

In *Trombetta, supra*, the concern expressed regarding "potentially exculpatory evidence" that is permanently lost is that the import of the materials are unknown to the defendant and oftentimes disputed. *Trombetta, supra*, 467 US 486; 104 S Ct 2533; 81 L Ed 2d 413. However, in the instant case, defendant's attorney heard the contents of the cassette tape at the preliminary examination before the cassette tape was lost. Moreover, an evidentiary hearing was held to determine whether the tape recorded conversation was material to defendant's case. Accordingly, the import of the cassette tape was not unknown to defendant. *Trombetta, supra*, 467 US 486; 104 S Ct 2533; 81 L Ed 2d 413.

In spite of this knowledge, defendant fails to offer a concrete explanation of how the missing cassette tape would have been favorable and material to his defense. *United States v Valenzuela-Bernal*, 458 US 858, 872; 102 S Ct 3440, 3449; 73 L Ed 2d 1193 (1982). Defendant cannot establish a violation without "making some plausible explanation of the assistance he would have received from" the introduction into evidence of the cassette tape. *Valenzuela-Bernal, supra*, 458 US 871; 102 S Ct 3448; 73 L Ed 2d 1193. Defendant has offered no such explanation. Accordingly, this Court will not reverse defendant's conviction.

Next, defendant argues that the trial court erred when it denied defendant's request for an instruction regarding the missing tape recording. We disagree. The determination whether a jury instruction is accurate and applicable in view of all the factors present in a particular case lies within the sound discretion of the trial court. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996).

In *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), the defendant argued that the trial court erred in failing to instruct the jury that, if the prosecution failed to make reasonable efforts to preserve material evidence, the jury may infer that the evidence would have been favorable to the defendant. The *Davis* Court held that because the defendant did not demonstrate that the prosecution acted in bad faith in failing to produce the evidence and because the evidence simply did not exist or could not be located, failure to give the instruction was not error. *Davis, supra*, 199 Mich App 515.

Defendant argues that *Davis, supra*, is inapplicable because the defendant, in that case, was required to establish bad faith on the part of the prosecution and in the instant case defendant was not

required to make such a showing. Defendant is correct in his assertion that he was not required to establish bad faith on the prosecution's part. *Brady, supra*, 373 US 87; 83 S Ct 11996-1197; 10 L Ed 2d 215. However, the same reasoning applies.

In *Davis, supra,* this Court ruled that the trial court did not err in failing to give a missing evidence instruction because the defendant failed to establish bad faith on the part of the prosecution which the defendant was required to do. *Davis, supra*, 199 Mich App 515. In the instant case, we conclude that the trial court did not err in denying a missing evidence instruction because defendant failed to make a showing that the evidence was material in that it would have affected the outcome of the trial. *Valenzuela-Bernal, supra*, 458 US 871; 102 S Ct 3448; 73 L Ed 2d 1193.

Finally, defendant argues that the trial court abused its discretion when it read the jury the standard jury instruction regarding flight. We disagree.

In order to give a particular instruction to a jury, it is necessary that there be evidence to support the giving of that instruction. *People v Johnson*, 171 Mich App 801,804; 430 NW2d 828 (1988). The term "flight" has been defined as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest and attempting to escape custody. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Evidence was introduced at trial to support a flight instruction, i.e., that defendant ran from the police in an attempt to avoid arrest. *Coleman, supra*, 210 Mich App 4; *People v Biegajski*, 122 Mich App 215, 220; 332 NW2d 413 (1982).

When Deputy Dare entered the apartment, he saw defendant running toward the stairs and chased him upstairs. Deputy Dare chased defendant into a bedroom where he tackled defendant on the bed and handcuffed him. Accordingly, there was evidence to support the trial court's reading of the flight instruction to the jury, and as a result, the trial court did not abuse its discretion.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White