

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 21, 2013

v

MUKHTIAR SINGH,

No. 312421
Saginaw Circuit Court
LC No. 11-036004-FH

Defendant-Appellant.

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Mukhtiar Singh, appeals as of right his conviction, following a jury trial, of assault with intent to do great bodily harm less than murder.¹ Because the trial court did not err by (1) denying Singh's request to issue certain jury instructions and (2) denying Singh's motion for a mistrial because police lost the recording of an interview, we affirm.

I. FACTS

A. BACKGROUND

In April 2011, Singh and codefendant Gurbachan Singh worked at Barone's Market in Saginaw. According to Vinishion Fowlkes, a counter, a plexiglass wall, and a secure access door separate the employees of Barone's Market from the customers.

Fowlkes testified that on April 1, 2011, he visited the store twice. Fowlkes testified that the first time he visited the store, he purchased a baby bottle. According to Fowlkes, four other people accompanied him to the store. While he was in the store, Singh or Gurbachan Singh remotely locked the store's door and asserted that one of the people in Fowlkes's group was attempting to steal merchandise. After the person replaced the merchandise, the employees unlocked the door.

Fowlkes testified that he returned to the store that evening and asked to exchange the baby bottle for a bottle of soda, but Singh denied his request in a laughing and sarcastic manner.

¹ MCL 750.84.

On the audio and video recording that was admitted into evidence, Gurbachan Singh accused Fowlkes of being with a person who was stealing earlier in the day. Fowlkes testified that became frustrated and “smacked” the soda bottle against the counter. Gurbachan Singh testified that Fowlkes threw the soda bottle against the cashier’s window and he believed that Fowlkes might be carrying a gun. Fowlkes testified that he then tried to leave the store but the door was locked.

According to Fowlkes, Singh left the counter area and repeatedly hit him with a baseball bat, and Gurbachan Singh also left the counter area and began hit him with his fists. Fowlkes testified that Singh and Gurbachan Singh eventually returned to the counter area and unlocked the door, and he left the store and called 911.

Saginaw Police Detective Allen Rabideau testified that he tape-recorded a statement from Fowlkes about five days after the incident. Detective Rabideau testified that “[t]here was a computer malfunction” and he could not recover the statement from the police department’s computer system.

B. PROCEDURAL HISTORY

Singh requested that the trial court instruct the jury on self-defense, defense of others, and defense of property. The trial court denied Singh’s request, ruling that the facts did not support the instructions because Singh did not honestly and reasonably believe that he was in imminent danger since he left the safety of the secured counter area to confront Fowlkes.

At the close of proofs, Singh moved for a mistrial, alleging in part that the loss of Fowlkes’s statement to Detective Rabideau violated the trial court’s discovery order and his right to due process under *Brady v Maryland*.² The trial court denied his motion.

II. EXCULPATORY EVIDENCE

A. STANDARD OF REVIEW

This Court reviews de novo a defendant’s claim that the prosecutor’s failure to disclose material exculpatory evidence violated his or her constitutional rights to due process.³

B. LEGAL STANDARDS

In *Brady v Maryland*, the United States Supreme Court held that “[d]efendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment.”⁴ In order to establish a *Brady* violation, the defendant must show that (1) the State possessed evidence favorable to the defendant, (2) the

² *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

³ *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

⁴ *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). See *Brady*, 373 US at 87.

defendant did not possess and could not have obtained the evidence with reasonable diligence, (3) the prosecutor suppressed the evidence, and (4) with the evidence, there was a reasonable probability that the result of the defendant's proceedings would have been different.⁵

C. LOSS OF FOWLKES'S STATEMENT

Singh contends that the State's failure to provide him with Fowlkes's statement to police violated *Brady* and denied him due process of law. We disagree.

We conclude that the trial court did not err when it denied Singh's motion for a mistrial on *Brady* grounds. *Brady* applies when the state fails to *disclose* evidence; it does not apply when the State fails to *preserve* it.⁶

Here, Singh was aware that Fowlkes made a statement to police and he specifically requested that statement during discovery. However, according to Detective Rabideau, the statement was accidentally lost because of a computer malfunction. Thus, the State did not fail to *disclose* that Fowlkes provided Detective Rabideau with a statement, it failed to *preserve* that evidence. In other words, *Brady* does not apply in the manner in which Singh attempts to apply it. We conclude that the trial court did not err by denying Singh's request for a mistrial on *Brady* grounds.

We also note that Singh would not have been entitled to a mistrial on the grounds that the State failed to preserve Fowlkes's statement interview. A criminal defendant can demonstrate that the prosecution violated his or her due process rights under the Fourteenth Amendment if the prosecution, in bad faith, failed to preserve material evidence that might have exonerated the defendant.⁷ If the defendant asserts that the prosecutor violated his or her rights by failing to preserve evidence, the defendant must prove that (1) the missing evidence was exculpatory, or (2) law enforcement personnel acted in bad faith.⁸

Here, Singh proved neither that Fowlkes's statement was exculpatory nor that the police acted in bad faith when they lost the recording. Thus, we would conclude that the State did not deny Singh due process by failing to preserve the recording of Fowlkes's statement.

D. VIOLATION OF DISCOVERY ORDER

Singh also contends the prosecutor violated his due process rights by violating the trial court's discovery order. We conclude that Singh has abandoned this assertion.

⁵ *Schumacher*, 276 Mich App at 177.

⁶ *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

⁷ *Id.* at 58; *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007).

⁸ *Hanks*, 276 Mich App at 95.

A party must provide authority for its assertions on appeal and may not give issues cursory treatment.⁹ Parties abandon issues on appeal if they “merely announce their position and leave it to this Court to discover and rationalize a basis for their claims.”¹⁰

Here, Singh provides no authority for his assertions that the prosecutor violated his rights by (1) failing to provide him with the names of witnesses, an opportunity to interview them, or a statement from Gurbachan Singh, or (2) failing to inform him that Fowlkes’s interview was lost until the time of trial. He simply states, without elaboration, that the prosecutor’s violation of the trial court’s discovery order violated his right to due process. Thus, we conclude that Singh has abandoned this assertion by failing to support it.

III. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

When reviewing a claim of instructional error, this Court views the instructions as a whole to determine whether the issues to be tried were adequately presented to the jury.¹¹ This Court reviews de novo questions of law, including whether an instructional error violated a defendant’s due process rights under the Fourteenth Amendment.¹² This Court reviews for an abuse of discretion the trial court’s decision regarding the applicability of a jury instruction to the facts of a specific case.¹³ The trial court abuses its discretion when its outcome falls outside the reasonable and principled range of outcomes.¹⁴

B. LEGAL STANDARDS

“A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.”¹⁵ The jury instructions “must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses, or theories if there is evidence to support them.”¹⁶ A defendant is entitled to a jury instruction if he or she requests an instruction on a theory or defense that is supported by the evidence.¹⁷

⁹ *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (quotation marks and citation omitted).

¹⁰ *Id.*

¹¹ *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

¹² *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010); *Martin*, 271 Mich App at 337.

¹³ *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

¹⁴ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

¹⁵ *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); MCL 768.29.

¹⁶ *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). See *McKinney*, 258 Mich App at 162-163.

¹⁷ *Riddle*, 467 Mich at 124; *McKinney*, 258 Mich App at 163.

C. APPLYING THE STANDARDS

Singh contends that the trial court erred by failing to provide the jury with instructions concerning self-defense, defense of others, and defense of property. We disagree.

The affirmative defenses of self-defense and defense of others apply if the defendant “honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.”¹⁸ A person does not have the right to inflict great bodily harm in the defense of his or her property.¹⁹

We conclude that the trial court did not abuse its discretion by declining to instruct the jury on self-defense, defense of others, or defense of property under the facts of this case. The reasonableness of a defendant’s belief depends on the defendant’s psychological characteristics and “what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor.”²⁰

Here, Fowlkes smacked or threw a soda bottle against the counter behind which Singh and Gurbachan Singh stood. Gurbachan Singh testified that he believed that Fowlkes might have been carrying a gun. Singh and Gurbachan Singh locked Fowlkes in the store, then left the secure counter area to confront him. The video recording and Fowlkes’s testimony both indicated that Singh beat Fowlkes with a bat and chased him around the store. These actions fall outside of the use of acceptable force to defend property, and do not comport with what a reasonable person would do if he or she had an honest and reasonable belief that he or she was at a risk of death or great bodily harm. We conclude that, under a rational view of the evidence in this case, the trial court’s decision not to instruct the jury concerning self-defense, defense of others, and defense of property was a reasonable and principled outcome. Thus, the trial court did not abuse its discretion.

We affirm.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Amy Ronayne Krause

¹⁸ MCL 780.972(1)(a); *People v Orlewicz*, 293 Mich App 96, 102; 809 NW2d 194 (2011).

¹⁹ *People v Doud*, 223 Mich 120, 131; 193 NW 884 (1923); *People v Shaffran*, 243 Mich 527, 528-529; 220 NW 716 (1928).

²⁰ *Orlewicz*, 293 Mich App at 102.