[Cite as *State v. Summers*, 2012-Ohio-4457.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0040**
- vs -	:	
JEREMY SUMMERS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CR 94.

Judgment: Affirmed.

Mike DeWine, Ohio Attorney General, State Office Tower, 30 East Broad Street, Columbus, 43215, and *Paul L. Scarsella*, Special Assistant Prosecutor, Ohio Attorney General's Office, 150 E. Gay Street, 16th Floor, Columbus, OH 43215 (For Plaintiff-Appellee).

Patricia J. Smith, 9442 State Route 43, Streetsboro, OH 44241 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Jeremy Summers, appeals his convictions, following a jury trial in the Ashtabula County Court of Common Pleas, for Aggravated Murder, Murder, Involuntary Manslaughter, Aggravated Robbery, and Complicity to Aggravated Robbery. The issue to be determined by this court is whether the trial court erred by failing to dismiss the charges against Summers when the State did not timely provide

certain evidence to Summers' counsel prior to trial. For the following reasons, we affirm the judgment of the trial court.

{¶2} On May 26, 2009, police were called to 255 Clay Street in Conneaut, Ohio. At the home, the victim, Richard Hackathorn was discovered, bleeding from his head and lying on the floor. Hackathorn subsequently died. The coroner's testimony established that the cause of death was homicide and that Hackathorn died from blunt force trauma to the head.

{¶3} A subsequent investigation lead to information that several individuals were present at the home on the date of the incident leading to Hackathorn's death, including Summers, Kayla Jarvi, Nathan Provan, and Amanda Fox, and that some of these individuals were suspected of causing Hackathorn's death.

{¶4} On March 19, 2010, Summers was indicted by the Ashtabula County Grand Jury for one count of Aggravated Murder, an unclassified felony, in violation of R.C. 2903.01(B); one count of Aggravated Murder, an unclassified felony, in violation of R.C. 2903.01(A); one count of Murder, an unclassified felony, in violation of R.C. 2903.02(B); one count of Involuntary Manslaughter, a felony of the first degree, in violation of R.C. 2903.04(A); one count of Aggravated Robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(3); and one count of Complicity to Aggravated Robbery, a felony of the first degree, in violation of R.C. 2923.03(A)(2) and R.C. 2911.01(A)(3).

{¶5} Prior to the trial in this matter, extensive discovery took place and there were several disputes between the State and defense counsel regarding the disclosure of certain evidence. On April 13, 2010, a pretrial hearing was held. At that hearing,

defense counsel noted that he had not received certain addresses of potential State's witnesses. He also stated that he did not receive the name of a witness named Robert Bigley, who he subsequently interviewed and from whom he received exculpatory evidence. The State agreed to provide the missing addresses to defense counsel.

{¶6} At a June 8, 2010 pretrial hearing, defense counsel argued in support of its Motion for Order to View Evidence, filed on May 25, 2010, which requested permission to view certain evidence in the possession of the Ohio Bureau of Criminal Investigation (BCI). The State noted that the items were presently in the possession of BCI and that BCI reports would be provided to counsel as they were received. Regarding counsel's requests for the results from a polygraph test, the State asserted that it believed no such test was conducted, but would be provided if it existed. Following that hearing, the trial court issued a Judgment Entry, granting the Motion for Order to View Evidence. The defense's May 25, 2010 Motion to Compel Discovery was partially granted to release EMS reports, but the court stated that the cell phones requested were already at BCI for testing.

{¶7} On August 30, 2010, defense counsel filed a Motion to Compel/Motion to Dismiss Charges, in which it asserted that it had received a redacted copy of telephone numbers from a cell phone found near the scene of the crime. On November 19, 2010, the trial court issued a Judgment Entry denying this motion, noting that defense counsel advised the court he had received "everything he needs in connection with the motion." However, at a hearing on February 24, 2011, the trial court noted that it had the requested telephone records and the State agreed to provide the records to defense counsel.

{¶8} A jury trial took place on May 11 through 17, 2011. Testimony was taken from various witnesses for both sides. The testimony of Nathan Provan, who was present at Hackathorn's house on May 26, 2009, established that he, Jarvi, Summers, and Fox went to Hackathorn's house and that Jarvi asked Hackathorn for money. While in the kitchen, Provan heard a thump, walked into the living room, saw Summers standing behind Hackathorn with a wooden stick, and saw Hackathorn on the floor. Fox also testified that while she was in a separate room with Provan, she heard a thump and then saw Summers standing next to Hackathorn, who was on the ground. The defense disputed that Summers hit Hackathorn and presented the testimony of Katlyn Scott, who stated that Provan admitted to hitting Hackathorn.

{¶9} During his cross-examination of Officer Timothy Rose, defense counsel stated that he had not received a police report Officer Rose had in his possession, even though he had requested that report during discovery. At that point, the State provided counsel with the report and the court ordered that a recess be taken for counsel to view the report. After reviewing the report, counsel noted that an individual named Jeffrey Boal was identified in the report, of whom counsel was previously unaware. Defense counsel also stated that he "was just given" additional police reports which he had not previously received or had a chance to review. Counsel moved for a dismissal of the charges due to the discovery of these new reports. The court noted that counsel had had an opportunity to review Officer Rose's report during the recess and found that the cross-examination and trial should continue.

{¶10} Subsequently, counsel explained to the trial court that he had received a few additional police reports during the lunch break which had not been provided during

discovery. The court found that the trial would go forward and noted that counsel had the "weekend to do some investigation." The court overruled the motion to dismiss the charges and the trial continued.

{¶11} The next day, defense counsel stated that he had read through the reports and noted the existence of another individual of whom he was unaware who may have pertinent information, Jeffrey Burns. Counsel read into the record certain information from a report by Sergeant Charles Burlingham, which he felt was exculpatory. Counsel explained that if he had received the reports during discovery, he would have been able to investigate issues related to these matters. Counsel again moved for a dismissal of the charges, which was denied, and the trial proceeded.

{¶12} At the conclusion of the trial, the State moved to dismiss count two of the Indictment, the Aggravated Murder charge pursuant to R.C. 2903.01(A). The jury was instructed as to the remaining five counts in the Indictment. The jury found Summers guilty of one count of Aggravated Murder, Murder, Involuntary Manslaughter, Aggravated Robbery, and Complicity to Aggravated Robbery. On May 18, 2011, the trial court memorialized the jury's verdict in a Judgment Entry.

{¶13} On May 24, 2011, the trial court issued a Judgment Entry, in which it found that all five counts were allied offenses of similar import and sentenced Summers to a term of life imprisonment with parole eligibility after 25 years. Summers was also ordered to pay restitution for the medical and burial expenses of the victim.

{¶14} Summers timely appeals and raises the following assignments of error:

{¶15} "[1.] The evidence is insufficient [to] sustain a conviction for the element of prior calculation and design.

{¶16} "[2.] The trial court erred when it failed to declare a mistrial and dismiss all charges against the appellant when there were repeated Brady violations, the appellant was denied the right to a fair and impartial trial and due process of the law."

{¶17} In his first assignment of error, Summers argues that there was insufficient evidence to sustain the prior calculation and design element of his conviction for Aggravated Murder.

{¶18} Summers was initially indicted for two separate counts of Aggravated Murder, one under R.C. 2903.01(A) and the other under 2903.01(B). Pursuant to R.C. 2903.01(A), the State was required to prove that Summers "purposely, and with prior calculation and design, cause[d] the death of another." However, he was not ultimately convicted of that charge. At the close of the trial, the State moved to dismiss that charge, noting that it did "not believe that there is sufficient evidence of prior calculation and design." The jury was ultimately not instructed as to this charge or given a verdict form related to the charge. Summers was convicted of the separate charge of Aggravated Murder under R.C. 2903.01(B), which does not require proof of prior calculation and design. R.C. 2903.01(B) (a person shall not "purposely cause the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, * * * aggravated robbery"). Since the State was not required to prove prior calculation and design for the Aggravated Murder offense of which Summers was convicted, this argument is irrelevant and need not be considered.

{¶19} The first assignment of error is without merit.

{¶20} In his second assignment of error, Summers argues that the State committed several violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which resulted in the denial of his right to a fair trial and due process of law. He argues that since the State failed to provide his counsel with several different exculpatory documents, the trial court erred when failing to either declare a mistrial or dismiss the charges when such violations occurred.

{¶21} The State argues that none of the evidence that it allegedly failed to provide to the defense was exculpatory and Summers suffered no prejudice as a result of not reviewing certain items prior to trial.[1]

{¶22} "The grant or denial of a mistrial rests within the sound discretion of the trial court." *State v. Anderson*, 11th Dist. No. 2009-T-0041, 2010-Ohio-2291, ¶ 44. "A court may grant a motion for a mistrial when a party is confronted by surprising new facts or conditions which were unknown despite reasonable trial preparation." (Citation omitted.) *State v. Wynder*, 11th Dist. No. 2001-A-0063, 2003-Ohio-5978, ¶ 12.

{¶23} In contrast, a trial court's determination relating to a motion to dismiss is reviewed de novo. *State v. Russ*, 11th Dist. No. 2007-T-0045, 2008-Ohio-1897, ¶ 14

{¶24} Pursuant to *Brady*, "[t]he 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." 373 U.S. at 87.

1. The State also sets forth an argument relating to certain photographs depicting Amanda Fox, which were not provided to the defense, and argues that the defense failed to follow up on these photographs. However, since no argument relating to these photos was raised by Summers, we need not address this issue.

{¶25} While Summers asserts that a violation of *Brady* occurred, and both parties evaluate this assignment of error under the *Brady* framework, it has been held that "a *Brady* violation * * * involves the *post-trial* discovery of information that was known to the prosecution, but unknown to the defense." (Emphasis added.) *State v. Beaver*, 11th Dist. No. 2011-T-0037, 2012-Ohio-871, ¶ 45, citing *State v. Wickline*, 50 Ohio St.3d 114, 116, 552 N.E.2d 913 (1990), citing *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *State v. Albanese*, 11th Dist. No. 2005-P-0054, 2006-Ohio-4819, ¶ 46 ("*Brady* involves the discovery of information *after* trial which had been known to the prosecution but unknown to the defense") (emphasis sic).

{¶26} All of the evidence in question includes items that were known or disclosed to the defense either at the time of the trial or prior to trial. The various police reports referenced were provided to defense counsel during the trial. The other information discussed by Summers in his brief, including potential witness addresses, cell phone records, and physical evidence were also either ordered to be disclosed to Summers or requests for production of such evidence were denied by the trial court. None of this evidence was discovered after the trial had ended, nor was it known only to the prosecution but not to the defense. Since the "alleged exculpatory records were presented *during* the trial, there exists no *Brady* violation requiring a new trial." (Emphasis sic.) *Wickline* at 116; *Beaver* at ¶ 45.

{¶27} "Exculpatory evidence" is defined as evidence favorable to the accused, which "if disclosed and used effectively, * * * may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

{¶28} "Failure to disclose exculpatory evidence, when discovered *during* trial, is governed by Crim.R. 16 rather than *Brady*." (Emphasis sic.) *Albanese,* 2006-Ohio-4819, at ¶ 46, citing *Wickline* at 116. "Prosecutorial violations of Crim.R. 16 are reversible only when there is a showing that (1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefited the accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect." *State v. Joseph*, 73 Ohio St.3d 450, 458, 653 N.E.2d 285 (1995).

{¶29} Summers asserts that several pieces of evidence were not provided until the trial had commenced. The first was the police report of Officer Timothy Rose. Summers asserts that this report discussed a potential witness, Jeffrey Boal, an individual that defense counsel was unaware of prior to the trial. As noted by defense counsel, the report stated that Boal had heard a male and female arguing outside at 261 Park Place, which was near the area of Hackathorn's home, prior to the time of the incident.

{¶30} We find that there was no prosecutorial violation of Crim.R. 16 as to the report of Officer Rose. First, there was no indication that the prosecution's failure to disclose this report prior to trial was willful. Once defense counsel stated that he was not provided with this report, a copy was immediately made and provided to him. The prosecutor asserted multiple times on the record that the failure to provide this report was unintentional and that it was his "understanding that discovery had been provided." The State pointed out that this confusion may have been due to a special prosecutor being appointed in the middle of the discovery process. Based on the foregoing, we cannot find a willful failure to disclose. *See Wynder*, 2003-Ohio-5978, at ¶ 14 (there

was no indication that the State's failure to identify a certain exhibit prior to trial was willful, since "[t]he state itself was unaware of this failure until brought to its attention by defense counsel at trial"); *State v. Smith*, 11th Dist. No. 2008-T-0023, 2008-Ohio-6998, ¶ 55 (where failure to disclose certain information to defense counsel was "the result of a misunderstanding," a violation of Crim.R. 16 was not willful).

{¶31} In addition, defense counsel failed to request a continuance during the course of the trial after he was given the police report containing the information about Boal. He instead requested only a dismissal of the charges or a mistrial. It has been held that if defense counsel is unprepared to proceed due to the State's failure to disclose evidence, it should seek a continuance in order to remedy the problem rather than seek dismissal. *Wickline,* 50 Ohio St.3d at 116 (the court's remedial powers under Crim.R. 16(L)(1), including the power to order a continuance, could have been sought by appellant and "were sufficient under the circumstances to ensure appellant was fairly tried"); *State v. Eckliffe*, 11th Dist. No. 2001-L-104, 2002-Ohio-7135, ¶ 18 (defendant should have sought a continuance when new evidence was revealed, such that "a prosecutorial violation of Crim.R. 16 could [have] be[en] easily remedied by the trial court").

{¶32} Finally, this court cannot find that Summers showed prejudice resulted from the State's failure to disclose this report prior to trial. Defense counsel was given time to review the report during the recess, prior to completing his cross-examination of Officer Rose. The court also noted that defense counsel would have time over the weekend to investigate any new issues that had arisen. Summers also makes no specific argument as to how the failure of disclosure of the potential witness, Boal,

caused prejudice. *Wynder* at ¶ 15 (in order to demonstrate prejudice under Crim.R. 16, the appellant must make more than bald assertions that he was "greatly prejudiced" or that the result of the trial would "have been different" given disclosure of the evidence).

{¶33} Further, Officer Rose testified that Boal had no information related to Hackathorn's murder. There is nothing in the record leading this court to believe that Boal had any information that would have benefitted Summers in his defense. Not only does Summers fail to prove prejudice, but he also cannot show that the disclosure of information related to Boal was exculpatory or material, such that it would have led to a different result in these proceedings. *Beaver*, 2012-Ohio-871, at ¶ 42 (where the undisclosed evidence "was not specifically material to appellant's guilt or innocence, * * * the state's failure to disclose it to the defense prior to trial was not improper").

{¶34} Regarding the next alleged violation at trial, Summers argues that a second police report provided during trial, written by Sergeant Charles Burlingham, contained information regarding Jeffrey Burns, another potential witness. According to the statement read into the record by defense counsel from the report, a call was received regarding Burns shortly after Hackathorn was assaulted and stated that Burns said something to a co-worker "about chasing someone all over town that hit someone in the head with a crowbar." Also, the report provided information relayed by Hackathorn's sons that one of Hackathorn's family members, who lives in New York, once stated that she would have someone come to Ohio and hurt him when he did not let her borrow money.

{¶35} We again find that there was no prosecutorial violation as to the failure to disclose this report prior to trial. As discussed above, the State again noted that it was

unaware the report had not been disclosed and that it was informed by the police department that numerous police reports had been provided to the defense. In addition, defense counsel again failed to request a continuance to further investigate this matter, even after the court requested that counsel suggest a remedy to the problem.

{¶36} There is also no evidence that this report was either material, exculpatory, or that any prejudice resulted from defense counsel's failure to receive this information prior to trial. There is no argument supplied by Summers as to how the statement regarding Burns had anything to do with Hackathorn or Summers. There is no statement about who, if anyone, was actually hit in the head with a crowbar. In addition, there was no evidence to support the theory that a family member may have been involved in the death of Hackathorn, when the alleged threat was made, or that such an individual was even in Ohio on May 26, 2009. There is no indication that this information would have benefitted Summers in his defense or that it would have led to a different result in the outcome of the trial.

{¶37} Summers cites generally to the further information contained in police reports, read into the record by defense counsel during trial, "that continued for several transcript pages," but cites no additional argument for what evidence the State failed to provide him with or how it resulted in prejudice. In the absence of any specific argument supporting what additional exculpatory evidence was not provided or how it impacted Summers' defense, we cannot find that the trial court erred by failing to declare a mistrial or dismiss the charges.

{¶38} Summers also cites the failure of the State to provide several items during the discovery process, including certain witness addresses, evidence tested by BCI,

phone records, and a polygraph report. He asserts that failure to initially provide those items shows a "pattern of non-compliance." However, Summers does not discuss how this impacted his defense in any way. It was stated in the various pre-trial hearings that the phone records and witness addresses would be provided to defense counsel. The items from BCI were ordered to be provided, to the extent that they were not at BCI for testing and had any evidentiary value. In addition, after these various items were requested and ordered to be provided by the court, there were no further objections regarding these items at trial. Prior to the beginning of the trial, defense counsel brought up several remaining issues and said he had no further problems. He did not state that he had not received the above described items. Summers fails to provide any argument as to why difficulty in obtaining the items during discovery would warrant a dismissal of the charges against him.

{¶39} The second assignment of error is without merit.

{¶40} For the foregoing reasons, the judgment of the Ashtabula County Court of Common Pleas, finding Summers guilty of Aggravated Murder, Murder, Involuntary Manslaughter, Aggravated Robbery, and Complicity to Aggravated Robbery, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.