Opinion issued June 2, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00177-CR

NATHANIEL AMBROSS PETTY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Case No. 1369135

MEMORANDUM OPINION

A jury convicted appellant, Nathaniel Ambross Petty, of possession with intent to deliver a controlled substance—cocaine—weighing between four and two

hundred grams.[1] The trial court found two enhancement paragraphs for prior felony convictions true and assessed appellant's punishment at thirty years' confinement. In his sole issue on appeal, appellant asserts that the State did not comply with *Brady v. Maryland*[2] regarding disclosure of an investigation involving the arresting officer that arose out of a different case.

We affirm.

Background

On November 26, 2012, Houston Police Department Officers M. Zamora and J. Castro were conducting undercover drug investigations in which they posed as drug users attempting to purchase narcotics in a high-crime area of Houston where drug dealers are known to be present. Officers Zamora and Castro stopped at one such location and were approached by appellant and another man. The officers purchased a 0.1 gram rock of crack cocaine from appellant for ten dollars. Appellant then showed the officers a larger amount of crack cocaine and said, "If you want the good [stuff], come look for me." He handed Officer Castro a piece of paper with his name and phone number on it.

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1 *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112 (West 2010); *see also id.* § 481.102(3)(D) (West 2010) (providing that cocaine is penalty group one substance).

2 373 U.S. 83, 83 S. Ct. 1194 (1963).

After Officers Zamora and Castro drove away, they radioed a nearby group of officers to arrest appellant. They informed the arrest team that appellant would have a $10 bill with a particular serial number and that appellant had a large quantity of cocaine in his possession. Officer T. Boles led the arrest team. He found appellant with the ten dollar bill with the matching serial number in his lap and the baggie of crack cocaine stuffed between his seat and the car's console. The bag of cocaine found next to appellant weighed 5.5 grams.

The day before appellant's trial began, the State filed a *Brady v. Maryland* disclosure stating that Officer Boles "has been currently part of an ongoing investigation regarding a citizen complaint." It stated that Officer Boles had not been relieved of duty and that no disciplinary action had been taken. The disclosure further stated that it was made "out of an abundance of caution and should not be construed as an admission by our office of any wrongdoing by Officer Boles." The State "reserve[d] the right to litigate the issue of admissibility of any of the facts contained in the disclosure in the future."

At trial, Officers Zamora, Castro, and Boles each testified. Officer Zamora testified that he could not identify appellant based on his memory from that night. However, Officer Castro identified appellant on the record as the man from whom he purchased the cocaine, and Officer Boles identified appellant as the man he arrested. During her cross-examination of Officer Boles, appellant's trial counsel

requested permission from the trial court to ask Boles whether he was under investigation by the HPD.

Outside the presence of the jury, the following discussion occurred:

> [Appellant]: I want to ask him one question regarding the investigation.
>
> [Court]: Yes; but if you are under investigation, that requires some explanation under investigation for what; and that is going to open the door to that, so what is the investigation for, State.
>
> [State]: Your Honor, my understanding from speaking with the officer in preparation for the trial is that there was a complaint regarding use of force. There were a number of different individuals that were the potential perpetrators of that if there even is actually a true complaint. This occurred during the execution of a subpoena where there was a number of different members of this officer's squad. My understanding from speaking with the officer is that the only description that was given of the person who allegedly used force on the complainant was that it was a white officer. There were a number of different white officers there, and that is really the crux of everything to my knowledge of the investigation.
>
> [Court]: It maybe is not directed against him. It is directed against all of the white officers in that squad until they find out whoever it purportedly was to make the complaint against and not whether it was a true complaint or a false complaint; but it is just that you got the right person, correct?
>
> [State]: Yes, Your Honor.
>
> [Court]: What is the relevance of that?

[Appellant]: Judge, my understanding was the notice specifically names this officer as the person who is being under investigation. That is what the notice says to me.

[Court]: What notice?

[Appellant]: The notice, the *Brady* notice that I got from the state.

. . . .

[State]: [We made the disclosure] out of an abundance of caution . . . . [B]ut in no way does that mean that we are conceding that we believe that this is now relevant.

[Appellant]: I would argue that the relevancy goes to credibility, that it goes to the weight to be given to his testimony, that any testimony that he gives about what happened in this case may or may not be affected by what his ongoing situation is; and I don't know how many officers are involved. I got notice on this officer.

[State]: Well, use of force doesn't go to credibility, first off; and second . . . , we don't have enough information for [appellant] to be able to cross-examine him on this. It is maybe this officer and maybe not this officer. A very vague description, I think, that it is not relevant; and it doesn't go to his credibility whether or not there was a use of force complaint against him.

[Court]: I am inclined to agree if that is all I know.

[Appellant]: I would just like for you to rule.

[Court]: Well, I am about to give you a ruling. . . . I am only asking you if you want to ask this man any

> questions before I bring the jury back. If that is all you want is a ruling, then that is what I will do.
>
> [Appellant]: That was the only question that I have.
>
> [Court]: Well, I am not going to allow you to do it. . . . I don't see any [probative value] based on the limited knowledge that I have about what happened without any testimony, [and] it would be, of course, more prejudicial than probative. I don't even see any probative value in it.

Appellant's counsel sought no further testimony from Officer Boles. The jury found appellant guilty, and this appeal followed.

Brady Violation

In his sole issue on appeal, appellant contends that the State did not comply with *Brady v. Maryland* "because information regarding [Officer Boles'] investigation was not given to the defense attorney until the day before the trial started."

A. Standard of Review

The United States Supreme Court has 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 punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963). Under *Brady*, the suppressed or undisclosed evidence must be both exculpatory and material. *Id.* Appellant must satisfy three

requirements to establish a *Brady* violation: (1) the State suppressed evidence; (2) the suppressed evidence is favorable to the defendant; and (3) the suppressed evidence is material. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). Information that is not exculpatory is not covered by *Brady*. *See id.*

In order to preserve an alleged *Brady* violation, a defendant must object and make the trial court aware of the complaint as soon as the grounds for the objection become apparent. *See Pena v. State*, 353 S.W.3d 797, 807–08 (Tex. Crim. App. 2011); *Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999); *see also* TEX. R. APP. P. 33.1(a)(1) (setting out rule for preservation of issues for review on appeal). The record must also show that an appellant obtained a ruling (or a refusal to rule) on the objection from the trial court. *See Pena*, 353 S.W.3d at 807.

When purportedly exculpatory evidence is not concealed but disclosure is untimely, the appellant bears the burden to show that the delay resulted in prejudice. *See Wilson*, 7 S.W.3d at 146; *see also Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999) (stating that appellant must show that evidence is material to establish prejudice and that prejudice is not shown when information was disclosed in time for accused to make effective use of it at trial). When the appellant fails to request a continuance, he waives any error resulting from the State's failure to disclose evidence in a timely manner. *See Lindley v. State*, 635 S.W.2d 541, 544 (Tex. Crim. App. 1982).

B. Analysis

Here, appellant requested an opportunity to question Officer Boles regarding the investigation against him, which the trial court denied. The record indicates that the State disclosed the information regarding Officer Boles' investigation prior to trial, and appellant's trial counsel's statements in court demonstrate that appellant received the disclosure. Appellant did not make an objection based on *Brady*, either that the evidence was never disclosed or that its disclosure was untimely, and he did not request a continuance on *Brady* grounds. Accordingly, we conclude that appellant failed to preserve his *Brady* complaint for review on appeal. *See Pena*, 353 S.W.3d at 807; *Wilson*, 7 S.W.3d at 146; *Lindley*, 635 S.W.2d at 544.

To the extent appellant attempts to argue on appeal that the trial court erred in refusing his request to question Officer Boles regarding the investigation, we conclude that this issue is inadequately briefed. Appellant's brief cites no authorities and provides no analysis on this issue. *See* TEX. R. APP. P. 38.1(i) (providing that, in order to assert issue on appeal, appellant's "brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities"); *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000) (holding that appellant waives issue on appeal if he does not adequately brief that issue, i.e., by presenting supporting arguments and authorities).

We overrule appellant's sole issue on appeal.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Brown, and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).