In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00207-CR

CALVIN DEWAYNE BREWER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 100th District Court
Collingsworth County, Texas
Trial Court No. 2981, Honorable Stuart Messer, Presiding

April 12, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant Calvin Dewayne Brewer was convicted by a jury of two counts of aggravated assault with a deadly weapon,[1] one count of deadly conduct,[2] and one count

[1] TEX. PENAL CODE ANN. § 22.02 (West 2018).

[2] TEX. PENAL CODE ANN. § 22.05 (West 2018).

of injury to a child.[3] He received concurrent sentences for the offenses.[4] He challenges his convictions through one issue. We will affirm.

Background

Because appellant's contention on appeal does not challenge the sufficiency of the evidence to support his convictions, we will relate only those facts necessary to disposition of his appellate issue. TEX. R. APP. P. 47.1.

Evidence at trial showed that in the summer of 2015, appellant assaulted his wife, her cousin, and his wife's two-year-old son. After police arrived at the home, appellant was taken to jail. The responding officer, James Ray Killian, testified to statements appellant made as he was getting into the patrol car and during the booking process. The statements were not disclosed prior to trial but came into evidence when Killian testified to the statements appellant made. Appellant did not object to admission of the statements at that time but later requested a mistrial on the basis of the State's failure to disclose them. The trial court denied that motion but gave a limiting instruction ordering the jury to "disregard any statements made by [appellant] at the time of booking."

[3] TEX. PENAL CODE ANN. § 22.04 (West 2018).

[4] Appellant pled "true" to each of the enhancement allegations alleged in the indictment and was sentenced to fifty years of imprisonment for each of his aggravated assault with a deadly weapon convictions, twenty years for his injury to a child conviction and one year in the county jail for his deadly conduct conviction.

Analysis

In his sole issue on appeal, appellant contends his due process rights were violated when the State failed to, prior to trial, disclose to him statements he made during the booking process and the identities of those who heard them.

The Supreme Court in *Brady v. Maryland* 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." *Pena v. State,* 353 S.W.3d 797, 810 (Tex. Crim. App. 2011) (citing *Brady v. Maryland,* 373 U.S. 83, 87 (1963)). The purpose of this rule is to avoid an unfair trial: "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." *Id.* (citation omitted).

To establish a *Brady* violation, the defendant must show (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith, (2) the withheld evidence is favorable to him, and (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Pena,* 353 S.W.3d at 809 (quoting *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002)). "*Brady* held that the State has a constitutional duty to disclose to a defendant material, exculpatory evidence. The scenarios to which *Brady* applies 'involve the discovery, after trial of information which had been known to the prosecution but unknown to the defense.'" *Pena,* 353 S.W.3d at 809 (citation omitted). Therefore, "the State does not have such a duty if the defendant was actually aware of the

exculpatory evidence or could have accessed it from other sources." *Id.* at 810 (citing *Harm v. State,* 183 S.W.3d 403, 407 (Tex. Crim. App. 2006); *Havard v. State,* 800 S.W.2d 195, 204-05 (Tex. Crim. App. 1996); *Jackson v. State*, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976)). *See also Ex parte Chavez,* 213 S.W.3d 320, 325 (Tex. Crim. App. 2006) ("[T]here is no due process violation under circumstances in which the defendant himself already knew about the exculpatory facts.").

Killian testified that as appellant was being booked into jail after his arrest, appellant "was laughing," and was "saying how he was going to beat this, it was just going to be a little old child endangerment charge and stuff like that. He said he had done this before." Killian also testified that a "dispatcher" or "jailer" helped him book appellant that night and overheard the statements.

It is undisputed that the State's pre-trial disclosures to appellant did not include the statements appellant made at the time of booking and did not include the identity of the jailer who, along with Killian, heard him make the statements. The statements came to light when, during Killian's testimony, Killian made reference to the statements. Nevertheless, we find no due process violation here.

First, courts have found the *Brady* rule does not apply when the appellant is already aware of the information of which he complains. *See, e.g., Hayes v. State,* 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (citing *Havard,* 800 S.W.2d at 204). In *Havard,* the court found "appellant knew of the fact that he made a statement to the police and the content of that statement . . . [He] knew of both the existence and the content of the statement, as a matter of simple logic, because he was there when it was made." 800 S.W.2d at

204. The court concluded the same in *Hayes,* finding the *Brady* rule inapplicable because appellant "was aware of the existence of, as well as the contents of, the letter" because "he wrote it." *Hayes,* 85 S.W.3d at 815. The same is true here. Appellant made the statements. Consequently, appellant was "already aware" of the substance of the information of which he complains on appeal.

Second, to prove a violation under the *Brady* rule, appellant must show the evidence the State failed to disclose was favorable. Favorable evidence "is that which, if disclosed and used effectively, '*may* make the difference between conviction and acquittal.'" *Pena,* 353 S.W.3d at 812 (citation omitted) (emphasis in original). Favorable evidence "includes exculpatory evidence as well as impeachment evidence. Exculpatory evidence is that which may justify, excuse, or clear the defendant from alleged guilt, and impeachment evidence is that which disputes, disparages, denies, or contradicts other evidence." *Id.* (citations omitted). The statements made by appellant are neither favorable nor exculpatory and indeed could only have hurt his case.

Third, the defendant must show the undisclosed information was material. To do so, appellant must show that, "in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure." *Id.* (citations omitted). The statements by appellant painted a negative picture of appellant and showed his lack of remorse for his actions. Appellant does not explain how their disclosure prior to trial would have made it "reasonably probable" that the outcome of the trial would have been different.

For these reasons, appellant's due process rights were not violated by the State's failure to disclose the complained-of information.

We overrule appellant's sole issue on appeal, and affirm the trial court's judgment.

James T. Campbell
Justice

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