NUMBER 13-19-00090-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

JACKLIN MUNIZ, **Appellee.**

On appeal from the 156th District Court of Bee County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Benavides

By one issue, the State of Texas (appellant) challenges the trial court's granting of appellee Jacklin Muniz's motion for new trial. We affirm.

I. BACKGROUND

A. Indictment and Pre-Trial

Muniz was charged by indictment with three counts: possession of a controlled

substance of less than one gram (counts one and three), a state jail felony, and possession of a controlled substance of more than one gram but less than four grams (count two), a third-degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.115(b), (c), 481.116(b).

Prior to trial, Muniz filed pre-trial motions requesting discovery under article 39.14 of the code of criminal procedure, as well as a "Motion for Discovery Regarding State's Witnesses" and a "Defendant's Motion for Discovery-Inducements for Testimony." *See* TEX. CODE CRIM. PROC. ANN. art. 39.14. The State orally agreed to the motions during a hearing, but the trial court never signed the orders attached to the motions. In July 2018, the State mailed its discovery letter to Muniz's counsel. In that letter, there was a section referring to documents that were available for viewing at the District Attorney's Office, including the criminal history of Jeremy Moreno, a co-defendant.

At a pre-trial hearing in August 2018, Muniz's counsel requested more time to investigate a recording made by a "co-defendant," Moreno, which implicated Muniz and "may have been made at the direction of a police officer." The State responded by stating that "there are a total of four defendants in this case" and discovery had been turned over to Muniz six weeks prior. The State asked the motion for continuance to be denied so it did not "delay the other three co-defendants."

At the September 2018 hearing, Muniz's counsel referenced the co-defendants in the case and noted there was an informal agreement between them that Muniz would be tried first. The trial court docket from an October 2018 pre-trial hearing showed that all four co-defendants had hearings set on the same day, which was the same date the State

dismissed Moreno's case.[1]

B. Trial on the Merits

At the trial on the merits, the State called Officer John Berry of the Beeville Police Department to testify regarding the traffic stop that led to Muniz's arrest. Officer Berry stated that on September 9, 2016, he witnessed Muniz commit a traffic violation and stopped her vehicle. There were six occupants in Muniz's vehicle, including two juvenile females. Officer Berry said he could smell the odor of marijuana coming from inside the vehicle, which allowed him to search the vehicle. Inside Muniz's vehicle, officers located "pills" in the front driver's side door, burnt marijuana joints in the front passenger side of the vehicle, and in the middle row of seats, they found a "bag of a crystal substance, a bag of white powdery substance," and more pills. The jury also watched Officer Berry's body camera video which recorded as the stop and search took place. One of the juveniles, Muniz's daughter, was found to have a bag of marijuana hidden in her bra. Muniz stated that the pills in the driver's door were "hers," but no one claimed ownership of the other narcotics.

Vanessa Ponce, a forensic scientist with the Texas Department of Public Safety's crime lab, testified that she tested the drugs that were submitted. Ponce stated the crystal substance was methamphetamine, the powdery substance was cocaine, and the two sets of pills were methamphetamine and N-ethylpentylone.

Sergeant Cecil Daniels from the Beeville Police Department testified about his

[1] During the motion for new trial hearing, the State told the trial court that Muniz's counsel "would have been present for the announcement of dismissal" at the October hearing.

interactions with Moreno. Sergeant Daniels explained that Moreno and his girlfriend came into the police station and wanted to speak to an officer. They played a cell phone recording of a conversation Moreno had with Muniz. Moreno would not release the phone to Sergeant Daniels, so he asked Moreno to take a disk home and make a copy of the cell phone recording. Sergeant Daniels stated that, because Moreno had made the recording, he could not say during trial that the recording had not been altered or tampered with. Sergeant Daniels testified that he had not instructed Moreno to record the conversation prior to Moreno speaking with him at the station. Sergeant Daniels stated he recorded the conversation with Moreno and his girlfriend while they were at the police station, including the playing of the cell phone recording. However, he explained that he asked Moreno to make a copy of the recording so the sound quality was less distorted.

Moreno testified he been in the middle row of seats in Muniz's vehicle when she was stopped and that he had smoked marijuana prior to the stop. Moreno stated that when the officer stopped them, Muniz reached towards the middle row of seats and handed her daughter, who was sitting in the third row of seats behind Moreno, a plastic bag. Moreno explained that they were all arrested because none of the occupants claimed responsibility for the drugs in the car, and he was angry because none of the narcotics belonged to him. Moreno testified that he decided to record the conversation with Muniz a few days later because the drugs in the car were not his and he knew Muniz was not going to "own" up to having the drugs, so he "needed some kind of evidence to show it wasn't mine or my girlfriend's at the time, so I thought I would get my phone and put it on record and just let [Muniz] talk."

Moreno stated that, during the recording, Muniz took responsibility for the drugs, but Muniz also attempted to place the blame on her daughter. The recording, which was played for the jury, included statements by Muniz that: she passed a bag to her daughter and she thought the drugs in the door were all the drugs they would find; "my vehicle, my shit" but the officer told her "no"; the drugs would get "owned up to"; the search was "bad" so not to worry; that there was "40's of ice [methamphetamine]" and "50's of coke [cocaine]" in the vehicle; and that she or another person would take the blame. On cross-examination, Muniz's counsel pressed Moreno to admit that he had incentive to try to exonerate himself since the drugs were found near where he was sitting.

During closing arguments, the State explained what an accomplice witness was and the accomplice witness instruction in the jury charge. The State stated that Moreno had "no deal" to testify and there was no testimony of any deal made. The State also told the jury that it did not believe that Moreno was an accomplice witness. Muniz's counsel argued that nobody else in the vehicle stated that Muniz was "passing" the drugs to her daughter and it was not on the audio Moreno produced. Additionally, Muniz's counsel stated there were credibility and chain of custody issues with the recording.

The jury convicted Muniz of all three counts. She pleaded true to the enhancement paragraphs for prior convictions. *See* TEX. PENAL CODE ANN. § 12.42 (enhancing the punishment range for repeat and habitual felony offenders). Muniz was sentenced to twenty years' imprisonment in the Texas Department of Criminal Justice—Institutional Division for counts one and three and sentenced to thirty-seven years' imprisonment on count two, with the sentences to run concurrently.

C. Motion for New Trial and Hearing

Following her conviction and sentence, Muniz filed a motion for new trial stating:

> On or about July 10, 2018, the Defendant, by and through her attorney of record, filed a discovery motion which was subsequently agreed to by the State in open Court on the date the motions were set for a hearing. Among other things, the State was required to disclose "the criminal record of each witness for the State showing every event which can be used to impeach the witness including any deferred adjudication probations, **arrests**, or juvenile adjudications pending against the witness **between the time of the offense alleged against the Defendant and Defendant's trial.**"
>
> After trial in the punishment phase, Defendant learned, for the first time, that one of the witnesses against her, **Jeremy Moreno**, was indicted on the same charges as the Defendant, arising out of the same transaction as the Defendant. This indictment, and **Jeremy Moreno's** subsequent arrest after indictment for the same offense, was not revealed to the Defendant until after the trial as [sic] concluded and the Defendant was awaiting a verdict on the punishment phase of the trial.
>
> Additionally, the State, in it's [sic] closing argument in the punishment phases alluded to **Jeremy Moreno's** arrest on the date of the alleged offense but failed to mention the subsequent indictment or arrest after the indictment of **Jeremy Moreno**.
>
> Included in the discovery motion was paragraph the [sic] required the State to tender to the Defendant, "all inducements offered by the State which [sic] might tend to motivate its witnesses to testify against Defendant, including, but not limited to, plea bargain agreements, fee, expense or reward arrangements, **agreements to dismiss or reduce or not bring charges** or any other agreement of leniency.
>
> The State not only failed to disclose the indictment of **Jeremy Moreno**, but they also failed to disclose the dismissal of the indictment, something that clearly was a motivating factor in procuring the testimony of their witness.

(Emphasis added by Muniz). Muniz requested that the trial court grant a new trial "in the interest of justice."

The trial court held a hearing on the motion for new trial where Muniz argued that the State "withheld exculpatory evidence and information which was material to the

defense of this case" by not disclosing that Moreno "not only had been arrested once and released, but subsequently had been indicted and the indictment had been dismissed." Muniz claimed the State's actions violated article 39.14 as well as the Court's discovery order, which also required the State to disclose any "inducements" and the witness's "criminal records."

The State responded that Muniz was aware of Moreno's indictment because it had a "docket sheet from October 18, 2018 in which Jeremy Moreno was two names ahead of Jacklin Muniz at the time of the announcement docket. I have a dismissal of Jeremy Moreno on October 18, 2018, and they were in—a representative—whether it was [original defense counsel] or [his associate], would have been present for the announcement of dismissal." The State admitted that the case against Moreno was dismissed on October 18, 2018, but argued that this was "not done pursuant to an agreement" with Moreno; instead, it was based on the tape recording that Moreno produced. The State also told the trial court that he told Muniz's counsel "face to face that I had dismissed Jeremy Moreno" because he "believed that Mr. Moreno was innocent of the charges." Additionally, the State pointed out that at no time during the trial did Muniz's counsel request the criminal history of any witness, although it was available to be viewed.

Muniz's trial counsel testified that Moreno's "testimony was the whole reason the jury convicted Ms. Muniz." He also stated that although he knew Moreno was arrested at the crime scene, the State "never disclosed that he subsequently had been indicted and that the indictment had been dismissed at a hearing in October." He stated he only found out because Muniz received information while in custody that Moreno had been in jail

"either in June or July," and when he looked into it, discovered that Moreno had been indicted. Trial counsel also stated that his trial strategy would have changed had he known about Moreno's indictment and dismissal because "the grand jury found sufficient evidence to issue a true bill," but he was "led to believe that [the indictment or dismissal] never happened." Muniz's trial counsel said the State never informed him of an indictment of Moreno and because of that Muniz was entitled to a new trial "in the interest of justice." On cross, Muniz's trial counsel stated he did not realize the trial judge had not signed the discovery orders because they had been agreed to in open court and did not remember the State telling him "prior to jury selection that [it] dismissed Jeremy Moreno because [it] believed him."

The State submitted evidence showing the docket sheet from October 18, 2018 that listed the four co-defendants in the case, one after the other; the motion to dismiss as to Moreno signed on October 18, 2018; and parts of the trial transcript showing the State's opening and Muniz's cross-examination of Moreno. The State admitted it did not "physically hand a dismissal indictment or a dismissal order indictment" to Muniz's trial counsel, but "told him to his face that [it] dismissed Moreno," and the dismissal was in the Court's file. The State agreed that no information regarding Moreno's arrest or indictment was provided to Muniz's trial counsel but also stated that trial counsel "did not seek from the Court a ruling on the criminal histories. At the time the witnesses took the stand, he could have urged at this time I ask the Court to divulge the criminal histories."

The trial court granted the motion for new trial on February 21, 2019. This State's appeal followed. *See* TEX. CODE CRIM. Proc. Ann. art. 44.01(a)(3) (allowing the State to

appeal an order granting a new trial in a criminal case).

II. MOTION FOR NEW TRIAL

By its sole issue, the State argues that the trial court erred in granting Muniz's motion for new trial because Muniz failed to establish the grounds for a new trial alleged in her motion.

A. Standard of Review

The standard of review when a trial court grants a motion for new trial is an abuse of discretion. *State v. Thomas*, 428 S.W.3d 99, 103 (Tex. Crim. App. 2014). The test for abuse of discretion is not whether, in the opinion of the appellate court, the facts present an appropriate case for the trial court's action, but rather "whether the trial court acted without reference to any guiding rules or principles." *Id*. (quoting *State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007)). The mere fact that the trial court may decide a matter differently from an appellate court does not demonstrate an abuse of discretion. *Id*. at 104. Appellate courts view the evidence in the light most favorable to the trial court's ruling, defer to the court's credibility determinations, and presume that all reasonable fact findings in support of the ruling have been made. *Id*. A trial court abuses its discretion if it grants a new trial for a non-legal or a legally invalid reason. *Id*. The trial court cannot grant a new trial based on mere sympathy, an inarticulate hunch, "or simply because he personally believes that the defendant is innocent or 'received a raw deal.'" *Id*. (quoting *Herndon*, 215 S.W.3d at 907).

A trial judge has the authority to grant a new trial "in the interest of justice." *Herndon*, 215 S.W.3d at 906 (noting that "'justice' means in accordance with the law").

While a trial court has wide discretion in ruling on a motion for new trial which sets out a valid legal claim, it should exercise that discretion by balancing a defendant's "interest of justice" claim against both the interests of the public in finality and the harmless error standards set out in Rule 44.2 [of the Texas Rules of Appellate Procedure]. *Id*. at 908; *see* TEX. R. APP. P. 44.2. The court of criminal appeals stated that

> a trial court would not generally abuse its discretion in granting a motion for new trial if the defendant: (1) articulated a valid legal claim in his motion for new trial; (2) produced evidence or pointed to evidence in the trial record that substantiated his legal claim; and (3) showed prejudice to his substantial rights under the standards in Rule 44.2 of the Texas Rules of Appellate Procedure.

Herndon, 215 S.W.3d at 909. The defendant need not establish reversible error as a matter of law before the trial court may exercise its discretion in granting a motion for new trial. *Id*. On the other hand, trial courts do not have the discretion to grant a new trial unless the defendant demonstrates that her first trial was seriously flawed and that the flaws adversely affected her substantial rights to a fair trial.[2] *Id*.

[2] The Texas Court of Criminal Appeals has held that "a substantial right is affected when the error has a substantial and injurious effect or influence in determining the jury's verdict." *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). The language came from *Kotteakos v. United States*, which stated:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. 750, 764–65 (1946).

B. Applicable Law and Discussion

A *Brady* violation occurs when the State suppresses—willfully or inadvertently—material evidence favorable to a defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006); *Kulow v. State*, 524 S.W.3d 383, 388 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). To demonstrate reversible error under *Brady*, an appellant must show (1) the State suppressed evidence, regardless of the prosecution's good or bad faith; (2) the suppressed evidence is favorable to appellant; and (3) the evidence is material—that is, there is a reasonable probability that, had the favorable evidence been disclosed, the outcome of the trial would have been different. *See Brady*, 373 U.S. at 87; *Ex parte Kimes*, 872 S.W.2d 700, 702 (Tex. Crim. App. 1993).

"Favorable evidence is that which, if disclosed and used effectively, 'may make the difference between conviction and acquittal.'" *Pena v. State*, 353 S.W.3d 797, 811 (Tex. Crim. App. 2011) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). Favorable evidence includes exculpatory evidence as well as impeachment evidence. *Id*. Exculpatory evidence is evidence that may justify, excuse, or clear the defendant from guilt. *Id*. at 811–12. Impeachment evidence is evidence that disputes, disparages, denies, or contradicts other evidence. *Id*. at 812. When favorable evidence is not concealed but disclosed untimely, a defendant bears the burden to show that the delay resulted in prejudice. *See Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999). A defendant is prejudiced if the result of the proceeding would have been different had the evidence been disclosed earlier. *See id.* at 866–67. Prejudice is not shown where the information

is disclosed in time for the defendant to make effective use of it at trial. *See id.*

Article 39.14 of the code of criminal procedure requires that "the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." TEX. CODE CRIM. PROC. ANN. art. 39.14.

While the State conceded that it failed to disclose Moreno's indictment and dismissal of the case against him, Muniz was still required to show the evidence withheld prejudiced her "substantial rights." *See* TEX. R. APP. P. 44.2(b); *Herndon*, 215 S.W.3d at 907. Although Muniz's counsel stated he only became aware of the status of Moreno's case while awaiting a punishment verdict, he had access to Moreno's criminal history in July 2018 as part of the required discovery order, which the State notified him was contained in their case file. However, although Muniz had the opportunity to cross-examine Moreno during trial, trial counsel stated during the motion for new trial hearing that he "most certainly would have used [information regarding Moreno's indictment] in cross examination had I been provided with a copy [of the indictment] because at least the grand jury found sufficient evidence to find that he had committed this offense." Trial counsel also explained that he was "led to believe that [the grand jury] never indicted [Moreno] because they didn't think he was part of this offense." Trial counsel testified that he would have changed his trial strategy had he known of the indictment and it was a "whole area I would have gotten into with Mr. Moreno but [the State] did not disclose. And, again, it's not just a matter of not disclosing. Led to believe that never happened." Trial

counsel stated that if he had known about the dismissed indictment against Moreno, he would have been able to use the information to mitigate harm to Muniz, as well as impeach Moreno.

The jury heard testimony that Moreno was in the vehicle with Muniz, that a portion of the narcotics were found in the row of seats where Moreno had been, heard the recorded conversation between Moreno and Muniz, and evaluated the witnesses and their credibility. However, trial counsel stated that his trial strategy and cross-examination of Moreno would have been completely different had he known that Moreno had been indicted for the same offense and subsequently had his case dismissed. The trial court found that Muniz's substantial rights were affected and because it found a legally valid reason for granting the motion, we will not disturb the trial court's ruling. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14; *Brady*, 373 U.S. at 87; *Thomas*, 428 S.W.3d at 103–04.

We hold the trial court did not abuse its discretion by granting the motion for new trial in the "interest of justice." We overrule the State's sole issue.

III. CONCLUSION

We affirm the trial court's granting of Muniz's motion for new trial.

GINA M. BENAVIDES
Justice

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

Delivered and filed the
27th day of August, 2020.