**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 29667-9-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **GARY DWAYNE McCABE,** | ) | **UNPUBLISHED OPINION** |
| | ) | |
| **Appellant.** | ) | |
| | ) | |

Brown, J. • Gary D. McCabe appeals his conviction for residential burglary. He contends (1) the State violated his *Brady*[1] due process rights by failing to disclose material exculpatory evidence, (2) ineffective assistance of counsel, and (3) the trial court erred by arbitrarily withholding a Drug Offender Sentencing Alternative (DOSA) RCW 9.94A.660. He alleges multiple concerns in his statement of additional grounds for review (SAG). We reject his contentions, and find no merit in his SAG. Accordingly, we affirm.

FACTS

The State charged Mr. McCabe with one count of residential burglary based on

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

the following summarized events that became evidence at trial. On October 1, 2009, Curtis Golden, a retired law enforcement officer, drove past Gerald Chase's house in his neighborhood and saw Mr. McCabe standing in front of the house. He watched Mr. McCabe remove a black bag from under his coat, walk up to the front porch, and forcibly push the front door open. Mr. Golden called the police. About four minutes later, police arrived and arrested Mr. McCabe as he was leaving Mr. Chase's deck. Police found foreign currency, silver ingots, and jewelry belonging to Mr. Chase stuffed in Mr. McCabe's pockets. In Mr. Chase's house, police found gloves, a black bag, and a jacket tied to Mr. McCabe with other apparently stolen items. Mr. Chase identified many of the items found on Mr. McCabe as his property that had been in his house.

On October 25, 2010, the morning of trial, defense counsel learned that the black bag removed from Mr. Chase's house contained a driver's license for Greg Olson and documents identifying a "Mary Lynn Gore" and a "Jody" with their respective phone numbers. Report of Proceedings (RP) (Oct. 25, 2010) at 58. Defense counsel asked the court for a continuance to investigate these items, claiming that the police had failed to document the contents of the black bag and contending that this evidence should have been disclosed prior to the day of trial. He explained that the police report indicated the black bag "with no contents listed." RP (Oct. 25, 2010) at 60. He further argued that the documents suggested that people other than Mr. McCabe were suspects in the case and that he needed additional time to prepare a defense in view of this new information.

The State responded that defense counsel had been provided with a list of evidence, which included a "black briefcase . . . details, description [of] full electronics, cell phones, iPods. It certainly doesn't indicate that it's empty." RP (Oct. 25, 2010) at 60. During trial, defense counsel elicited testimony that police had removed numerous items of evidence from the black bag, including motel room keys, wrist watches, foreign currency, and game cards and had separately secured and itemized these items and provided a list to defense counsel. The State further argued that defense counsel had access to all evidence before trial. The court denied defense counsel's motion for a continuance, stating, "I don't think that the State withheld [the evidence]." RP (Oct. 25, 2010) at 64.

On October 26, 2010, the second day of trial, Officer Darrell Rohde delivered a credit card belonging to Gerald Chase to the prosecutor. The credit card had been discovered by Officer Rohde on October 12, 2010, in the back of his squad car. The prosecutor promptly informed the court of this evidence. Defense counsel asked the trial court for a continuance to investigate this new information. The trial court granted a brief continuance to allow defense counsel to arrange for the card to be fingerprinted and to question Mr. Chase. No fingerprints were found on the card and Mr. Chase thought he had lost it in Mexico; according to his bank, he had never activated the credit card. The defense moved for another continuance to get information regarding the criminal records of people transported in the squad car where the card was found. The court denied the continuance, but did order that the information be provided.

Defense counsel moved for a mistrial after the State rested. Defense counsel argued the contents of the black bag and the credit card were "exculpatory evidence that should have been disclosed and for whatever reason wasn't disclosed." RP (Oct. 27, 2010) at 316. The court denied the motion, stating the State's duty was to disclose exculpatory evidence it knew about: "At this time, the Court does not believe that there was any kind of duty. If they don't know about it, they don't have to disclose it." RP (Oct. 27, 2010) at 317.

A jury found Mr. McCabe guilty. Mr. McCabe requested a DOSA sentence. The court denied a DOSA and imposed a standard range sentence. He appealed.

## ANALYSIS

### A. *Brady* Violation

Mr. McCabe contends his due process right to a fair trial was violated because the State failed to disclose evidence and failed to learn of exculpatory evidence and thus, the trial court erred in denying his mistrial.

We review due process violations de novo. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011). A *Brady* violation impacts constitutional due process. *Id*.; *see Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Therefore, we review *Brady* claims de novo. *Id*. Failing to disclose evidence favorable to the defense violates an accused's due process rights if the evidence is material to guilt or innocence. U.S. Const. amends. VI, XIV; *Brady*, 373 U.S. at 87. The United States Supreme Court has expanded and explained the *Brady* rule in subsequent

years. *Mullen*, 171 Wn.2d at 894; *see Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375 (1985); *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Strickler v. Greene*, 527 U.S. 263, 280-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

A *Brady* violation requires three showings: (1) the evidence at issue is favorable to the accused, as either exculpatory or impeaching, (2) the State suppressed the evidence, either willfully or inadvertently, and (3) the accused is prejudiced by the suppression. *Strickler*, 527 U.S. at 281-82.

Regarding the first element, Mr. McCabe points to *Bowen v. Maryland*, 799 F.2d 593, 612-13 (10th Cir. 1986), for the rule that "[e]vidence that leads to the identity of other possible suspects is evidence favorable to the defense." Br. of Appellant at 7. The State does not dispute that the evidence could be considered favorable.

Regarding the second element as it pertains to the contents of the black bag, Mr. McCabe contends the court incorrectly relied on the State's lack of willfulness. He argues "[t]he evidence was suppressed, albeit perhaps inadvertently." *Id*. at 8. He claims "by providing the defense with a list of the objects that had been removed from the bag, and omitting any mention of documents from that list, the State misled defense counsel as to the existence of that evidence, thus inadvertently suppressing the evidence." *Id*. at 8-9. Although the State acknowledges "the prosecution listed a black

bag as evidence but not the evidence contained within the black bag," it points out that "the defense attorney had access to the bag and its contents from April 2010 to October 2010." Br. of Resp't at 6-7. Accordingly, we agree the State did not suppress or hide the contents of the black bag.

Regarding the second element as it pertains to the victim's credit card disclosed the second day of trial, Mr. McCabe contends the trial court erred because it "denied the motion for a mistrial based on the erroneous belief 'if they [the prosecutors] don't know about it, they don't have to disclose it.'" Br. of Appellant at 10. But as the State correctly responds, "[w]hile it is true that 'the prosecution cannot avoid its obligations under *Brady* by keeping itself ignorant of matters known to other state agents, it has no duty to independently search for exculpatory evidence.'" Br. of Resp't at 4-5 (citing *In re Pers. Restraint of Brennan*, 117 Wn. App. 797, 72 P.3d 182 (2003)). The State agrees "the prosecutor has a duty to disclose evidence under the control of staff immediately even when newly discovered evidence is found during trial." Br. of Resp't at 5; *see State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980)). The record shows the State's compliance by immediately bringing the credit card to the court's attention and disclosing it to defense counsel. The court granted a continuance to allow defense investigation and ordered the State to provide information regarding the squad car. Defense counsel then questioned the victim and the officer about the credit card at trial.

Regarding the third element, prejudice occurs if the evidence is material to guilt or innocence. *See Strickler*, 527 U.S. at 282. Evidence "is material 'if there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler*, 527 U.S. at 280 (quoting *Bagley*, 473 U.S. at 682). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-10. Mr. McCabe merely suggests "the undisclosed evidence could have been used by the defense to uncover additional leads or develop additional defense theories." Br. of Appellant at 9. He does not explain how the evidence could have affected guilt or innocence. Moreover, when evaluating materiality, the evidence should be "considered collectively, not item by item." *Kyles*, 514 U.S. at 436. And he does not show prejudice based upon the alleged late disclosures.

In sum, we conclude no *Brady* violation occurred. Mr. McCabe received due process and a fair trial. It follows that the trial court did not err in denying Mr. McCabe's mistrial motion.

B. Ineffective Assistance

The issue is whether trial counsel was ineffective for failing to examine the contents of the black bag prior to trial. Mr. McCabe alternatively contends defense counsel's failure to timely examine the contents of the black bag prejudiced him.

We review ineffective assistance of counsel claims de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). A criminal defendant possesses the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104

S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 889 P.2d 1251 (1995). To prove ineffective assistance of counsel, Mr. McCabe must show (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced him. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Regarding the deficient performance prong, Mr. McCabe speculates the information was exculpatory and could have led him to pursue different defense theories. Even if counsel's failure to investigate was deficient, the second *Strickland* prong requires Mr. McCabe to show "a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (quoting *McFarland*, 127 Wn.2d at 334-35)). Even if counsel had examined the contents of the bag prior to trial, and even if he had pursued other defense theories, Mr. McCabe was seen entering the victim's home and was arrested leaving the home with the victim's belongings. Although Mr. McCabe argues the documents could suggest other possible defense theories, he specifically presents none.

Given all, we conclude Mr. McCabe was not prejudiced by his attorney's late examination of the contents of the black bag.

C. Sentencing

Mr. McCabe contends the trial court abused its sentencing discretion by

arbitrarily denying him a DOSA.

Generally, a trial court's decision to deny a DOSA is not reviewable. *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 60 (2003); *State v. Smith*, 118 Wn. App. 288, 292, 75 P.3d 986 (2003); RCW 9.94A.585(1). However, "appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). A trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A decision is based on untenable grounds or made for untenable reasons when it was reached by applying the wrong legal standard. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

A sentencing court shall waive the imposition of a standard range sentence in favor of a DOSA sentence "[i]f the sentencing court determines that the offender is eligible . . . *and that the alternative sentence is appropriate*." RCW 9.94A.660(3) (emphasis added). The legislature has granted trial courts the discretion to impose a DOSA. *State v. Gronnert*, 122 Wn. App. 214, 226, 93 P.3d 200 (2004). Although the trial court does not have the discretion to categorically deny a DOSA, it does have to decide whether a DOSA will benefit both the offender and the community. *See State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005); *State v. White*, 123 Wn. App. 106, 115, 97 P.3d 34 (2004); RCW 9.94A.660(2).

Mr. McCabe complains: "In denying DOSA, the court said, 'You get caught, and

then you get convicted, and now you want me to have leniency.'" Br. of Appellant at 13. He argues the "statement reflects one of two possible considerations. Possibly the court believed Mr. McCabe should not have the benefit of DOSA because he had exercised his right to trial instead of pleading guilty. Alternatively, the court denied DOSA because, according to the prosecutor, Mr. McCabe had allegedly denied the need for treatment." *Id*. Mr. McCabe argues "[t]he sentencing court may not impose a greater sentence because a defendant has exercised his right to go to trial." Br. of Appellant at 14 (citing *State v. Richardson*, 105 Wn. App. 19, 22-23, 19 P.3d 431 (2001)). He correctly notes the court may not "base a sentencing decision on facts that were never proven or acknowledged by the defendant." *Id*. (citing RCW 9.94A.530(b)).

However, Mr. McCabe takes the statements out of context. The court partly reasoned:

> . . . part of the reason when I give people treatment and say you can do treatment is because they're standing here saying I've screwed up and I need treatment, and that's not the case. You get caught, and then you get convicted, and now you want me to have leniency, and my concern is as [the prosecutor] said . . . you have 15 convictions, felony convictions.
>
> My concern is that you have been given breaks before, and even though you say you're not a violent person, I consider kicking in someone's door at their home and breaking into their home very scary for people. Part of your rights are to be safe in your home and secure in your home.
>
> So at this point looking at your history, I am going to give you the 84 months.

RP (Jan. 13, 2011) at 434. The court's statement indicates it was not imposing a greater sentence because Mr. McCabe went to trial or initially denied a treatment need;

rather the court reasoned Mr. McCabe wanted leniency, not treatment. Specifically, the court noted its sentencing decision was based on Mr. McCabe's criminal record and the nature of the crime. Given all, we cannot conclude the court improperly exercised its discretion in denying Mr. McCabe a DOSA.

D. SAG

Mr. McCabe raises several concerns in his SAG, mainly regarding one juror who had worked as a court reporter for a different trial judge before whom Mr. McCabe had appeared on more than one occasion. The factual background for Mr. McCabe's juror concern is largely unsupported by our record even though he asked his appellate counsel to seek documentation. But because the juror was an unseated alternate, and because of the record deficiencies, we do not address them further. Additionally, Mr. McCabe is concerned he was entitled to a lesser included instruction, his defense counsel inaccurately informed the court he had not yet been evaluated for chemical dependency, and this court should stay appeal proceedings since appellate counsel has refused to communicate with him about his case or order transcripts of voir dire.

First, regarding Mr. McCabe's request for a lesser included instruction, the court explained, "Mr. McCabe's statements to the officers was I never went in the house, the first degree criminal trespass would be out because he would have to enter in and remain unlawfully. If he says he never went in, it wouldn't fit." RP (Oct. 28, 2010) at 351. Based on this record, the trial court did not err in denying his request for a lesser included instruction.

Second, Mr. McCabe's dependency evaluation concern is irrelevant because, as discussed above, the court properly denied DOSA based on his criminal record and the facts of the crime.

Third, Mr. McCabe's stay concerns relate to his failed arguments regarding the seating of the court reporter as an alternate juror and thus, whether his appellate counsel failed to order the transcripts he requested is of no consequence.

In sum, we conclude Mr. McCabe's SAG lacks merit.

Double H requests attorney fees on appeal. Since it does not prevail here, it is not entitled to attorney fees.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

Brown, J.

WE CONCUR:

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Sweeney, J.

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Siddoway, J.