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HUNTER'S MOTION FOR A MISTRIAL BASED UPON A CLAIMED BRADY
VIOLATION WAS PROPERLY DENIED

Hunter purports to base his Brady claim upon two photographs of Hunter taken at different times on the night of his initial arrest. There is no dispute that the photograph taken immediately after Hunter was initially detained by the Volusia County Sheriff's Department shows him wearing no shirt at all. (R 942-3). The trial court's description of the photograph is accurate, as comparison of the photograph to the court's description establishes.¹ (R 942-3). Hunter has not suggested how that photograph is in any way exculpatory, and, moreover, has not suggested why this photograph could not have been used at trial. To the extent that Hunter may suggest, in his reply brief, that because the photograph depicted Hunter without a shirt on, that fact could somehow be used to challenge the in-court identifications by made by the three surviving victims, that argument fails on the facts.² There is no dispute that four individuals were involved in the robbery and murder of Wayne Simpson, and that four black males were in the car in which Hunter was riding and from which numerous items of property belonging to the robbery victims were recovered. Further, no one has suggested, at any time, that any of the four robbers was shirtless at the time of the robbery. The fact that Hunter was

¹ Hunter's alias "Michael Miller" appears on some of the photographs.

² Hunter was also identified as the trigger-man by one of his cohorts (R 787). Further, Hunter admitted the shooting to the driver of the car (R 682) and to his mental state expert (R 1424).

not wearing a shirt at the time he was initially detained establishes nothing other than perhaps that Hunter and one or more of his co-perpetrators removed their shirts after they returned to their vehicle. Rather than supporting Hunter's position, these facts strengthen the inference that Hunter and his co-perpetrators were changing shirts in the process of flight from the scene of the murder. Moreover, these facts explain, at least by inference, why Hunter was wearing a white t-shirt later on that evening. Hunter's attempt to predicate a Brady claim on that photograph is specious because that photograph is neither exculpatory nor material. In any event, Hunter had the photograph at the time of trial, and could have used it however he wanted in his case-in-chief. The fact that he did not use evidence which was clearly and indisputably in his possession does not give rise to a Brady claim. The trial court correctly found the photo not to be exculpatory, and the conviction should not be disturbed.

The Lineup Photographs

The second component of Hunter's Brady claim is based upon the photographs used in the photo lineup. That lineup is a part of the record of these proceedings and is denominated as Exhibit CC. Hunter concedes that he was provided with a "photostatic copy" of that lineup (Sup. Int. Br. at 2-3), and, in ruling on Hunter's motion for mistrial, the trial court found that there had been no nondisclosure. (R 942). Hunter argues, nevertheless, that under the trial court's ruling "the state has no duty to disclose exculpatory evidence but merely provide

copies of their case file." (Sup. Int. Br. at 4-5). Hunter also argues that a Brady violation exists because the lineup photocopy was provided to him at a deposition scheduled by counsel for co-defendant Boyd and which was attended by counsel for Hunter. That deposition was in connection with another case. Hunter's position is that because the photo lineup was given to him at an unrelated proceeding, the disclosure, which indisputably occurred, was insufficient. Each case relied upon by Hunter is distinguishable on the facts, and, despite Hunter's protestations, neither component of his claim has any legal basis.

As to the first element of Hunter's claim, Florida law is settled that the state is not required to actively assist the defense in investigation of the case, nor is the state required to "make a complete and detailed accounting to the defense of all police investigatory work on a case." Spaziano v. State, 570 So. 2d 289 (Fla. 1990); see also, Wuornos v. State, 644 So. 2d 1000, 1006 (Fla. 1994) (state not required to do discovery for the defense); Hegwood v. State, 575 So. 2d 170 (Fla. 1991); Smith v. State, 641 So. 2d 1319, 1322 (Fla. 1990) (no duty on the part of the state to actively assist defense investigation); Hansbrough v. State, 509 So. 2d 1081, 1084 (Fla. 1987) (same); Medina v. State, 466 So. 2d 1046, 1049 (Fla. 1985). Stated in different terms, the prosecution is required to disclose exculpatory evidence to the defense, but is not required to explain to the defense why certain evidence may be exculpatory or how that evidence could conceivably be used at trial. On pp. 4-5 of the

supplemental brief, Hunter argues that Brady places an obligation on the state to do more than produce evidence and makes it incumbent on the state to identify potentially exculpatory evidence with particularity. That argument is contrary to settled law and is patently absurd. The state's discovery obligation does not include suggesting strategy or theories of defense to Hunter's attorney; Hunter's claim has no legal basis and does not set out any ground for relief. The state fully complied with its obligation under the discovery rules, and the usefulness of the photographs was up to Hunter to decide. Hunter knew beyond doubt that the photos existed, and he had every opportunity to inquire into any matters concerning those photos that he deemed necessary. The state is not required to do that for him, and the conviction should not be disturbed.

The second component of Hunter's claim is that even though he reviewed Exhibit CC at a deposition (R 922-3; 940), that was not sufficient disclosure of the photo lineup because that deposition was taken in connection with a case pending against Hunter's co-defendant. In addition to reviewing Exhibit CC at that deposition, Hunter was given a photocopy of that exhibit. (R 940-941); see, Exhibit FF. To the extent that Hunter now claims that that disclosure was insufficient, that suggestion elevates form over substance to an incredible degree and completely ignores the fact that Hunter had the original line-up photographs in front of him and had every opportunity to examine them at his leisure. Moreover, there is no reason that Hunter could not have opened the lineup folder and viewed the entire

photograph had he wished to do so.³ Furthermore, both the original and the photocopy of the lineup folder clearly reflect that Hunter is wearing a white t-shirt that is plainly visible upon even the most cursory review. See, Exhibits CC and FF. That evidence was disclosed to Hunter, and he should not be heard to complain. There is no basis for reversal, and the conviction should not be disturbed.

Moreover, Hunter has never claimed that the field interview cards (FI cards) completed by the Volusia County Sheriff's Department at the time of Hunter's initial detention were not disclosed to him. The trial court specifically found that the field interview cards had in fact been disclosed to Hunter. (R 943) The field interview cards have a section on them for describing the interviewee's clothing, and the procedure for completing that section of the FI card was developed in detail at the time of trial. (R 932). Moreover, there is not, nor has there ever been, any suggestion that the clothing section of the FI card applicable to Hunter was not completed. Because Hunter had the clothing information in the form of the FI cards, his protestations regarding the photographs are disingenuous. The very information that Hunter claims not to have had was clearly before him and was given to him on at least two occasions. There was no nondisclosure on the part of the state, and Hunter should not be heard to complain. Because there was no non-disclosure on

³ There is no indication in the record whether or not Hunter did in fact review the entire photographs by opening the manila folder which contained the photo lineup. It is clear from a review of Exhibit CC that the entire photo could have been viewed if desired.

the part of the state, Hunter has failed to even approach the gateway showing necessary to raise a claim of a Brady violation. His claim is utterly meritless, and the conviction and sentence are due to be affirmed.

To the extent that Hunter may argue that the fact that the photograph contained in Exhibit CC shows him dressed in a different t-shirt from that described by the robbery victims means that the photograph would have been exculpatory, that argument is tenuous at best. There is no dispute that the Exhibit CC photograph was taken quite a period of time after the initial detention on Nova Road, and quite some period of time after the photograph depicting Hunter shirtless. In light of Hunter's undisputed possession of the field interview cards which contained the clothing description closest in time to the murder, the Exhibit CC photograph, to the extent that it depicts clothing, is no more than surplusage which is of no value in light of the more contemporaneous evidence that was beyond doubt in Hunter's possession. Finally, defendant's argument totally ignores the fact that Hunter was obviously present each time he was photographed, and obviously knew what clothing he did or did not have on at that time. Consequently, the fact that Hunter was photographed, and the description of his clothing at the time each photograph was taken is a matter which is clearly within the knowledge of the defendant, and is clearly accessible to him. While the photographs themselves would be in the physical possession of the state, the knowledge that those photographs were taken and the knowledge of the mode of dress at the time of

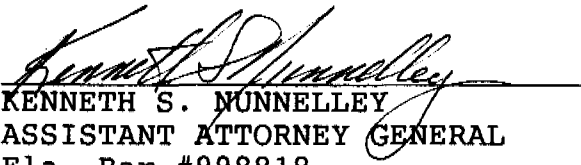
each photograph is a matter peculiarly within the knowledge of the defendant. In summary, the evidence was as accessible to Hunter as it was to the state. Hunter should not be heard to complain.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

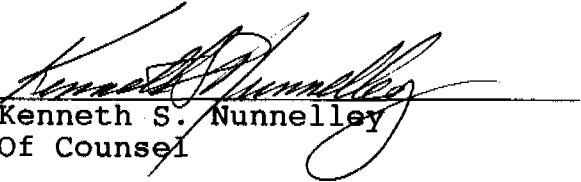
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Supplemental Answer Brief has been furnished by U.S. Mail to George D.E. Burden, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 10th day of February, 1995.


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