IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC 07-1700

(4th DCA 4D06-2039)

DAVID D. DEREN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEALS
RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent/Appellee may also be referred to as the State.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Police Report

The police report reflects that when the victim, Jerry Fitzpatrick, the bar's bouncer, told co-defendant Mr. Stewart to leave the Ale House, he refused and while trying to remove Stewart, Appellant struck him in the back of the head with a bar stool (R. 1-2).

Information

Appellant was charged by information with Aggravated Battery and Disorderly Conduct.

Motion for Production of Medical Treatment

Appellant moved for production of the victim's post crime drug rehabilitation records (R. 109-147).

Trial Testimony

Dominique Steffan is currently an employee of the Stuart Grill and Ale (T. 52). On the night of the incident, she was working as the general manager of another night club, but was at the Ale House on the night of the crime (T. 53). She knew the victim, Jerry Fitzpatrick, as he was a former employee and knew Appellant from growing up in Stuart (T. 54). She saw Appellant and co-defendant, Nate Stewart, at the Ale House that night and watched the manager and security guard go over and ask them to calm down after one of them fell off a bar stool (T. 55). They were joking around, drinking, "play fighting" and they both jumped off the barstools

(T. 55-56). That is when management and security said something to them (T. 56). She has been in the bar business for ten years and in her opinion she would have stopped serving them, but management and security usually make that decision (T. 56).

She saw a barstool come down twice and saw a fight when she looked over (T. 56). Appellant had the barstool (T. 57).She saw the bar stool coming down in Appellant's hand, but did not see who he was hitting (T. 76). The barstool ended up in the same place he picked up, upside down (T. 76). Appellant and (Stewart) were fighting with Fitzpatrick (T. 57). She saw Appellant kick Fitzpatrick (T. 57). She saw Stewart and Fitzpatrick wrestling on the floor and saw Fitzpatrick trying to restrain him (T. 57). She pushed Appellant outside and he stayed outside (T. 57). She tried to stop on-lookers from getting involved or egging on the fight (T. 58). She told Appellant and Stewart that the cops were on their way and that they should probably stop (T. 58).

She did not know who was fighting who, but she thought Appellant would recognize her and not retaliate when she pushed him outside (T.58). Once outside, she helped him take off his shirt (T.58). Appellant kept saying, "he got what he deserved" (T. 59). Appellant told her that they were fighting with Fitzgerald because, "he tried to kick us out before last call" (T. 59,61).

Because the floor was slippery, every time Stewart and Fitzpatrick stood up, they would fall back down (T.59). She saw

Stewart punch Fitzpatrick, who was trying to restrain him by grabbing his arms (T. 60).

She saw Appellant with a barstool and kicking (T. 60,62). She thought that if she removed Appellant, it would help, as it would no longer be two against one. (T. 63). As a result of her actions the fight stopped almost immediately, and Stewart was held down by two individuals at the front door until the cops arrived (T. 63-65).

She went inside to get the blood off her and to check on Fitzpatrick, who was bleeding from the head (T. 65). She told him that he needed to go to the hospital, because he started to look "lazy" (T. 66). After the fight, the bar was a bloody mess (T. 66). She saw Fitzpatrick five days later at the Ale house and then learned the following day that he had a seizure (T. 67). When she saw him again, she found him to be not "himself" and no longer fun to be around (T. 67-68).

Sean DeVito came around toward the end of the night (T. 73-74,83). She never saw Fitzpatrick throw punches, she only saw him trying to grab Stewart's arms (T. 84). She did not see who started the fight (T. 91). She never saw Fitzpatrick with his arm around Stewart's neck (T. 92). She did not think two on one was a fair fight (T. 95). Her friendship with Fitzpatrick would not change her testimony (T. 96). If Appellant had been the one getting hit with a barstool, she would be defending him (T.100). When she was pushing

Appellant out the door, he was screaming obscenities into the doorway at Fitzpatrick (T. 96). Appellant was saying things to Fitzpatrick and provoking him still at this point (T. 97). Appellant was trying to get back in the door and probably could have gotten around her if he wanted to (T. 97-98). Appellant was bleeding from a broken nose and she tried to help him wipe it off (T. 98-99). Fitzpatrick was also bleeding (T. 98).

When **Officer Melvin Barbre** arrived at the Ale House, he saw Appellant standing outside and girl between him and door, who was yelling at him not to go inside (T. 103). He told Appellant stay where he was and he complied (T. 103). He saw Jerry Fitzpatrick on the ground, lying on top of another guy, who appeared to be trying to get away (T. 103-104). Fitzpatrick told him that there had been a fight. He handcuffed the suspect and told him he was under arrest, so he could investigate and interview (T.104-105). There were only six or seven people there (T. 105). He arrested David Deren and Nathan Stewart (T. 106). It appeared that they had been drinking, but not falling down drunk (T. 106). Fitzpatrick appeared shaken up and upset about what happened, but the longer he remained on the scene, the more concerned he became about his health (T. 106). Fitzpatrick was physically deteriorating and appeared to be going into shock, so he called an ambulance (T. 106). He was losing his balance and becoming confused and he was concerned that he had a head injury (T. 107). This fit with what

the witnesses told him had occurred (T. 107). He saw Fitzpatrick a couple of times in the month after the crime and noticed he was having difficult maintaining his balance and could not work, and may have lost some of is memory (T. 107).

When he arrived, Appellant was bleeding and seemed very agitated. (T.108). Appellant seemed to want to go back inside, but did not want to injure Dominique in order to do it (T. 109).

Dr. Hal Tobias is the neurologist who treated Jerry Fitzpatrick for neck pain, back pain and headaches (T. 124-126). Fitzpatrick also suffered attention or memory problems, a closed head injury, post concessive syndrome, nightmares, trouble sleeping, post traumatic headaches, and blurry vision, which was consistent with the incident (T. 128-130). He began treating Fitzpatrick on 1/19/05 and released him to return to work on 3/8/05 (T. 133). The symptoms associated with post concessive syndrome include an unsteady or robot like gait, as he observed in Fitzpatrick, headaches, memory problems, personality change, depression and lapses in mental ability (T.133). He had no indication that Fitzpatrick was malingering (T. 142). He was retained by the workers compensation carrier to treat Fitzpatrick for the injuries sustained in the fight (T. 143).

Jerry Fitzpatrick testified that has worked security for night clubs for 17 years (T. 151). He has had martial arts training and experience and has participated in seminars (T.151-152). His job

was to make sure there were no fights and no one falling down drunk (T.153). He first observed Appellant and Stewart, when he saw Appellant fall off a bar stool and appear to be very inebriated (T. 153). Stewart was also inebriated, as he would lead in too far to talk to people (T.153). He approached them and told them it was time to go and sat back down (T. 153). A few minutes later, he approached and told them again that it was time to go (T. 153). At first they said “okay” we are leaving (T. 153). When he went back a third time, Stewart told him to go “F” myself” and get the rest of these people out of here and then we will leave (T.154). He told him that he was only asking he and Appellant to leave (T.154). Stewart was very verbally aggressive and he reached down and grabbed his glass and Fitzgerald thought Stewart was going to hit him with the glass (T. 154). He grabbed Stewart underneath his arms and pulled him to the front door. At the same time, he felt “flashes” which were Appellant hitting him on the back of the head (T. 155). Stewart hit him in the head and was trying to get away (T. 155). He tried to shove Stewart out the door, and he bounced back into him, because the door was locked, and continued to fight (T. 156). He fell to the ground and Stewart lay on top of him (T. 156). That is when he saw Appellant run up with the bar stool and hit him in the head with it at least three times (T.156). From then on, he is a little foggy (T.156). He was blocking the hits from the bar stool (T. 156). Stewart continued to struggle and try

to fight (T. 156). At one point he had both of them on the ground (T. 156). At one point the struggle stopped and he was trying to get them to walk out the door (T.157). Appellant was walking around, shoving female customers (T.157). He grabbed Stewart and took him to the door and again he bounced back, he fell and they were stomping on his head and kicking him (T. 157). He grabbed a leg to get himself up and then punch Appellant in the nose, about four times (T. 157). At that point, he was no longer trying to restrain Stewart, he felt like he was fighting for his life (T.158). He then threw Stewart on the ground and Appellant was hitting him on the back of the head (T.158). Dominique took Appellant outside and he was able to restrain Stewart with the help of Sean, another employee (T. 158).

Appellant and Stewart never tried to leave, that was goal and he would have let them go (T.159). There was a short break where everyone calmed down, but it didn't last long (T. 160).

He had a concussion, which caused dizziness, nausea, and confusion and memory problems (T. 160-161). He became addicted to pain medications and admitted himself into "rehab" (T.161-162). He had to move back in with his parents (T. 162). He identified Appellant as the one who hit him with the bar stool (T. 164).

On cross examination, Fitzpatrick acknowledged that he had been in 500 bar fights as a bouncer and had a broken vertebra in his T-spine (T. 166). He was already on the ground when Appellant

hit him with the bar stool (T.172).

After he asked them to leave, Appellant and Stewart had gotten another round of drinks; he thought shots (T.172). He grabbed the glass from Stewart because he was cursing and acting aggressively (T. 173). He asked Appellant and Stewart to leave because they were overly intoxicated (T. 176). They told him that they were getting ready to leave, but Stewart wanted to finish the beer he paid for (T.177). He had no problem with them staying to finish the beer, but when he saw them go back to get another drink, he went back over there (T.177).

He took Percocet, 10 milligrams, twice a day (T. 177). Prior to that, for several months he was staking 7.5 milligrams twice a day (T.178). Prior to that, for several months, he was taking 5 milligrams, twice a day (T.178). This was all related to a prior injury he sustained at another establishment (T. 178). He had not had anything to drink for several months before this incident (T. 178).

Fitzpatrick was confronted with emergency room records from 6 days after the crime which indicate that he had taken a Percocet and “Jager Bomb” (T. 179-180). They want to try to get them to leave on their own, but if that fails, they want him to take them out (T. 183). He would not grab a customer and take him out the door for no reason, he believed Stewart was going to take a glass and smash him in the face (T.183).

Appellant was so intoxicated that he fell off his barstool, but he was not aggressive; Stewart was aggressive (T. 185). He thought the glass was going to be used as a weapon (T.185-186).

He had to go to “rehab” because he would forget that he took his medicine and then re-medicate (T.188). This was as a result of the injuries he sustained in the fight (T.189). He had been prescribed Oxytocin a long time ago (1997) and he had a prescription for it (T.189). He stopped taking them a long time ago (T.189). He had also been prescribed Dilaudid, after the incident (T. 189-190). This is what he overdosed on (T. 190).

Sean David became involved in the fight at the very end to help him restrain Stewart (T.190). When he first tried to remove Stewart, he had him by the armpits, and was facing him (T.197). He denied kicking and punching Stewart when he was on the ground (T. 198).

His involvement in the “500" fights was stopping them (T.200). He was injured working at the Ashley, which caused a compression injury to his spine (T.201). Stewart did not appear to be afraid of him when he asked him to leave – Stuart was aggressive and rude (T.202).

He was prescribed Darvocet, Percocet and Dilaudin (T. 207). The January 27, 2005 medical record that indicates Methodone may have been a recommended treatment (T. 207). He now has occasional headaches, memory loss, and a stiff neck (T. 226).

Sean David testified that he works as a bartender at the Ale House, but on the night of the fight, he was there, drinking with friends (T.232-233). Appellant and Stewart were sitting behind him, he heard them banging glasses and then started to get really loud and obnoxious (T. 233). They were starting to close up and they were asked to leave (T.233). He heard Fitzpatrick tell them it was closing time, that they were getting loud and it was time to leave (T.235). Fitzpatrick had a stern tone but was not rude or aggressive (T.235). At first they were talking but then it escalated to the point where Fitzpatrick grabbed one by the arm and was escorting him out the door (T. 236). He saw Appellant pick up a bar stool, throw it at Fitzpatrick, hitting him in the neck/ back area (T.236). Fitzpatrick and Stewart began to wrestle on the ground (T.236). He did not get involved because he was expecting another bouncer to intervene, but Fitzgerald was getting hurt, because it was two on one (T.236-237).

He grabbed one of them and told him to calm down, that the police were coming and offered to walk him to the door. He claimed down and appeared tired (T. 237). All of a sudden, he slammed him up against him and they fell to the floor and began wrestling (T.237). He did not want to be involved (T. 237). Fitzgerald was wrestling with both of them and Dominique was yelling for them to stop (T. 238). She coerced Appellant to go outside (T. 238). When Fitzgerald had him (Stewart) by the neck - Stewart was calm

(T.240).

Dominique was talking to Appellant, but he was really enraged and was screaming and cursing and saying, “don’t hurt him” (T. 242). Fitzpatrick told him to sit on Stewart’s legs (T. 242). They were just holding him down, they were not kicking or hitting (T.243-244). He worked with Fitzpatrick and considered him a nice man (T. 245). He only saw Appellant deliberately throw the bar stool at Fitzpatrick’s back (T.246).

He remembered hearing Fitzpatrick telling them to finish their beers and that the bar was going to close, but Stewart was irritated (T.256). He did not see anyone use a weapon until the stool was thrown (T.258). He saw Fitzpatrick grab Stewart by the arm and start heading toward the door (T.259). When he was sitting on Stewart, his face was toward the grown (T. 261).

Nicole Guyon was working as the manager of the Stuart Grill and Ale on the day of the crime (T.275-276). It was slow and she noticed Appellant and Stewart fighting amongst themselves and saw them knock over a bar stool (T.277). She walked over and took their last two drinks away and put them on the bar (T. 277). Before the barstool was knocked over, Jerry Fitzpatrick asked if he could leave, and she agreed (T.277). After the barstool was knocked over, Fitzpatrick told Appellant and Stewart to leave (T. 277). They started to walk out the door when Appellant threw the barstool at Fitzpatrick (T.278). He went down and then he and Stewart were on

the ground fighting and Appellant was outside yelling (T. 278). Sean (David) got on top of Stewart to hold him down and she called police (T.278).

After the incident, Fitzgerald was really groggy and an ambulance came (T. 279). Appellant was not fighting, he was just yelling and screaming and tried to come back into the bar (T.280). She identified a stool from the bar, which was of the same type that was thrown at Fitzpatrick (T.281-283). She stated that Fitzpatrick was physically removing Stewart and Appellant was behind them (T. 290). He was escorting Stewart out the door, not dragging him (T. 300). When they dropped the stool, she walked over to them and told them that they had enough to drink and they were asked to leave (T.303-304). They were not asked to leave so the bar could close early (T.304).

Amanda Vaughn was bartending the night of the crime and was getting off work because it was "dead" (T.307). When a barstool suddenly fell, she agreed with Jerry Fitzpatrick that he should "kick them out" (T.309,312). They were getting rowdy and the manager cut them off at the bar (T. 309). She was clocking out on the computer when she heard a lot of ruckus, turned around and saw a barstool thrown on the ground and Fitzpatrick fighting two guys by himself (T. 310). Fitzpatrick was hunched over because he was just hit in the head and two guys jumped on his back and were punching him from behind (T. 310-311). One went outside and the

other guy was pinned on the ground (T. 311). Fitzpatrick was trying to defend himself against two guys with alcohol in their system (T. 311). She identified Appellant as the one who picked up the bar stool and throw it (T.313). Appellant and Stewart were the aggressors, all Fitzpatrick was trying to do was escort them out (T.314).

After the fight, Fitzpatrick was very nauseous and she had to fill out his report for him (T. 314). He was walking like a crippled old man, and seemed to have complete memory loss (T.314). He was defending himself but seemed delirious because he had just been hit in the back of the head (T.326). Appellant and Fitzpatrick were throwing equal punches until Appellant gave up (T.327).

Appellant stated before going to the ale house, he had wings and beer, then shot pool for an hour, and had a couple of beers, and then he and Nathan Stewart and his friend "Sam" arrived at the Stuart Ale house around 11:00 pm (T. 353-355). They were joined by John Larson and his friend, Dan (T. 356). He had a couple of beers at the Ale house (T.355). When he returned from the bathroom and stepped up to the barstool, "it" got kicked over (T.354). John and Dan left around midnight (T.355). He and Stewart were drinking beer and Sam was sitting with them (T.355). They decided to leave and Sam went outside to make a phone call, while Stewart finished his beer, which was 3/4 full (T.356). Fitzpatrick approached, told Stewart that they were closing and had to leave, and Stewart said

he was just going to finish his beer and then walked away (T.357). Fitzpatrick returned two to three minutes later and said “I told you guys you need to get out of here and this is the last time I’m coming up here” (T.358). Stewart said to Fitzpatrick, if you are closing why are you not asking other people to leave (T.358). It was not crowded but there were several people there (T.359). Stewart told him to give him a minute to finish his beer and Fitzpatrick grabbed his arm, while he was holding the beer glass, knocking it out of his hand (T.359). Fitzpatrick put Stewart in a head lock and forced him toward the door (T.360). They were not yelling at each other and they could not understand why he was confronting them while other people were still drinking (T.360-361). He thought Stewart was in physical trouble (T.361). He saw Jerry slam Stewart to the ground and crouch over him, with his left knee on Stewart’s shoulder and they were fighting each other (T.361-362). Fitzpatrick was getting the best of the situation and it scared him, so he ran up, kneed and punched Jerry in the head and knocked him off Stewart (T. 362). People ran up and started yelling and he got snatched from behind by Sean DiaVite (T.362). He knocked Sean off and found himself in a head lock from behind and lifted off his feet, which left him wide open for Fitzpatrick to hit him in the face (T.362). His nose and wrist were broken, but he did not receive immediate medical attention (T.364).

He denied that Stewart made a threatening gesture with the

glass and denied throwing a bar stool or using it as a weapon in any way, but admitted that it was possible that a bar stool got knocked over as he ran to the aid of Stewart, or other people in the bar could have done it (T.367-368). He slammed Sean against a wall to release himself from the choke hold and then ran out the door (T.369). He was yelling for them to get off Stewart (T.369).

Appellant admitted that he had been to three different places drinking beer that night and Sam was their "designated driver" (T.372).

John Larson testified in co-defendant's Stewart's case that Appellant and Stewart were drinking beer, not fighting with each other, nor were they falling down drunk (T.411).

Samuel Berkowitz testified in Stewart's case that Appellant and Stewart were in the middle of paying their tab when he went outside to use the phone and expected them to follow him out right (T.416). They were drinking beer, and did not think they were drunk or "mad" at each other (T.417). The police showed up and they brought Appellant and Stewart outside (T.417). He was the designated driver because Appellant and Stewart knew they were going to be drinking too much (T.419).

Nathan Stewart testified that he was drinking beer, but denied having any shots (T.425). He paid the tab because they were ready to go home (T.425-426). He got himself one last beer and did not plan on driving (t.426). When Fitzpatrick approached and told them

it was time to leave, he said I just paid my tab and as soon as I finish my beer we will be out of here (T.427). Fitzgerald's tone of voice was more aggressive the second time when he said "I thought I told you guys to get the hell out of here." (T.428). He told Fitzpatrick that he was trying to finish his beer, to give him 30 seconds to finish it and he would leave (T.428). He proceeded to take a sip of his beer and that is when Fitzpatrick turned violent (T.428). Fitzgerald was behind him and he spilled the beer over his shirt which made him upset (T. 429). Fitzgerald placed him in a choke hold and dragged him toward the door (T.429). He panicked because he could not breath and broke free (T.430). Fitzpatrick was shoving him up against a locked door, so he bounced backwards (T. 431). Fitzpatrick was throwing punches and he was blocking them to defend himself (T.431-432). He could not see what Appellant was doing, but saw him make contact with Fitzpatrick (T.440).

Motion for a New Trial

Defense counsel moved for a motion for new trial (R. 218-222),which was denied after a hearing (T. 628-632).

SUMMARY OF THE ARGUMENT

I. THE FOURTH DISTRICT CORRECTLY HELD THAT THE STATE DID NOT VIOLATE BRADY V. MARYLAND, 83 S. CT. 1194(1963), AS THE DEFENSE WAS AWARE OF THE VICTIM'S WORKERS COMPENSATION CLAIM AND THE LETTER WAS NOT MATERIAL AS IT COULD NOT HAVE REASONABLY AFFECTED THE OUTCOME OF TRIAL.

Although this Court no longer conducts a "due diligence" analysis on a Brady allegation, whether the evidence alleged to have been withheld by the state was equally accessible to both the state and defense is a element the Court may consider in determining whether a material violation occurred. The State argues that because Appellant was aware of the victim's workers compensation claim, he had equal access to the information he claims was improperly withheld by the state. Further, the evidence was not material and could not have put the case in such a light as to reasonably affect the outcome of the trial.

II. THE DISTRICT COURT DID NOT ERR WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF THE MOTION FOR PRODUCTION OF THE VICTIM'S POST CRIME DRUG REHABILITATION RECORDS. THE RECORDS WERE NOT RELEVANT AND WERE UNFAIRLY PREJUDICIAL.

The State argues that the District Court correctly affirmed the trial court's denial of the motion for production of post crime drug rehabilitation records. The records were not relevant to time period at issue, and any possible relevance connected to the victim's post crime memory loss, was substantially outweighed by the danger of unfair prejudice.

ARGUMENT

I. **THE FOURTH DISTRICT CORRECTLY HELD THAT THE STATE DID NOT VIOLATE BRADY V. MARYLAND, 83 S. CT. 1194(1963), AS THE DEFENSE**

WAS AWARE OF THE VICTIM'S WORKERS COMPENSATION CLAIM AND THE LETTER WAS NOT MATERIAL AS IT COULD NOT HAVE REASONABLY AFFECTED THE OUTCOME OF TRIAL.

Appellant was charged with Aggravated Battery and Disorderly Conduct arising from an altercation at the Stuart Ale House between Appellant and Co-Defendant, (Stewart), and the victim, Jerry Fitzpatrick, who was the establishment's security guard. Appellant was convicted of the lesser included offense of Battery and of Disorderly Conduct. (R. 183).

Appellant unsuccessfully moved for a new trial after learning that the State did not disclose a letter it received from the victim's worker's compensation carrier concerning the amount of medical and lost wage benefits paid and inquired about restitution. (T. 218-222). The State disclosed the letter after the verdict, but before the sentencing hearing. Id.

Appellant argued on appeal that the trial court erred when it found no Brady violation occurred. Deren v. State, 962 So. 2d 385 (Fla. 4th DCA 2007). The Fourth District held that that because Appellant had access to records detailing with the type of medical care the victim received, he should have known about the workers compensation benefits and could have obtained the information found in the letter through the exercise of reasonable diligence. The Fourth District applied the second Brady prong, cited in Melendez v. State, 612 So. 2d 1366,1368 (Fla. 1992), which requires that the defendant neither possesses the evidence nor could he obtain it himself with any reasonable diligence. The District Court held,

"The state need not actively assist the defense in investigating a case." Id. *citing to* Hegwood v. State, 575 So. 2d 170,172 (Fla. 1991).

Appellant obtained discretionary jurisdiction with this Court arguing that because the Forth District found that the state should have provided the defense with the letter, it erred when it did not analyze whether the absence of the letter resulted in prejudice.

The State recognizes that the analysis applied by the Fourth District is no longer used by this Court and that there is no "due diligence" requirement in the Brady test. *See* Archer v. State, 934 So. 2d 1187,1202 (Fla. 2006). The State also acknowledges that the Fourth District did not conduct an analysis of whether the defendant was prejudiced and did not examine whether the evidence could reasonably be taken to put the whole case in such a light as to undermine the confidence in the verdict. Id.

However, the State argues that when the current Brady analysis is applied to the facts of this case, the District Court's opinion should be affirmed as Appellant had equal access to the evidence and the evidence could not have reasonably be taken to put the whole case in such a light as to undermine the confidence in the verdict.

Standard of Review

The Florida Supreme Court has stated that the determination of whether a Brady violation has occurred is subject to independent appellate review. Floyd v. State, 902 So. 2d 775 (Fla. 2005) *citing*

to Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002); Way v. State, 760 So. 2d 903, 913 (Fla. 2000)("Although reviewing courts must give deference to the trial court's findings of historical fact, the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review.").

In order to establish a violation, a defendant must prove: [1] the evidence must be favorable or impeachment; [2] the evidence must have been suppressed by the State, either willfully or inadvertently; [3] prejudice must have ensued. Brady v. Maryland; Archer v. State, 934 So. 2d 1187 (Fla. 2006); Maharaj v. State, 778 So. 2d 944,953 (Fla. 2000)(*citing to* Strickler v. Greene, 527 U.S. 263, 281-82, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999)).

In Strickler v. Greene, 119 S. Ct. 1936, 1952 (1999), the High Court stated:

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Id. (internal citations omitted).

In applying these elements, the evidence must be reviewed in the context of the entire record. State v. Riechmann, 777 So. 2d 342, 362 (Fla. 2000); Sireci v. State, 773 So. 2d 34 (Fla. 2000); Haliburton v. Singletary, 691 So. 2d 466, 470 (Fla. 1997)).

Argument

Recently in Doorbal v. State, 33 Fla. Law Weekly S107

(February 14, 2008), defendant alleged that the state withheld evidence that the victim was being investigated for Medicare fraud, which he would have used for impeachment. This Court rejected the claim finding that the trial record was replete with indications that the defense knew about the allegations. Id. This Court held that a Brady Claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, because it cannot then be found to have been withheld. Id.

In the case at bar, it is clear that the defense knew that the victim, (Fitzgerald) had a workers compensation claim. Dr. Hal Tobias testified at trial that he was retained by the Fitzpatrick's workers compensation carrier (T. 143). Post trial, when defense counsel argued for a new trial based on the alleged the Brady violation, he acknowledged that he knew about the workers compensation claim and even stated that he cross examined the victim on the issue, although a review of the transcript indicates that he did not.(T. 628,629,631). Further, defense counsel stated that he made efforts to contact the Hartford Insurance Company to discuss the claim, but they did not return his calls. (T. 628-629, 631). Therefore, like in Doorbal, the workers compensation evidence cannot be found to have been withheld, because Appellant knew about the claim.

This Court typically does not reach the prejudice prong when it determines that there was no violation of Brady because the

defense knew about the evidence he claims was suppressed by the State. *See* Riechmann v. State 966 So. 2d 298,308 (Fla. 2007); Overton v. State, 32 FLW S775 (November 29, 2007); Peede v. State, 955 So. 2d 480,497 (Fla. 2007);Stewart v. State, 801 So. 2d 59,70 (Fla. 2001); Occhicone v. State, 768 So. 2d 1037,1041,1042 (Fla. 2000); Freeman v. State, 761 So. 2d 1055.1063 (Fla. 2000); Haliburton v. Singletary, 691 So. 2d 466(Fla. 1997); Provenzano v. State, 616 So. 2d 428,430(Fla. 1993); Roberts v. State, 568 So. 2d 1255,1260 (Fla. 1990); US v. Prior, 546 F.2d 1254 (5th Cir. 1977).

This Court has also addressed whether the evidence was material after finding that the state did not improperly withhold evidence. In Freeman v. State, 761 So. 2d 1055 (Fla. 2000), the case relied on by the Fourth District in the case at bar, defendant argued that the State failed to inform counsel of a witness's statement. Id. at 1062. This Court found that the record established that defendant knew or should have known about the witness and could have discovered details about her statement through the exercise of reasonable diligence. Id. However, in a footnote, this Court did address the prejudice prong of Brady, stating that there was no reasonable probability that the outcome of the trial would have been different. Id. at 1063, FN.5.

This Court addressed the prejudice prong in Archer v. State, 934 So. 2d 1187,1202 (Fla. 2006), where the defense argued that the state withheld evidence that a witness had been involved in

burglary in another state. This Court reasoned that because defendant testified about that crime at trial, even if there was non disclosure, it was not prejudicial. Id.

Archer also argued that the State failed to produce police reports concerning another robbery which he would have used as impeachment evidence. Id. This Court explained that although there is no "due diligence" requirement in the Brady test, defendant failed to show that there was anything in those reports which he was unaware and which would have put the case in such a different light as to undermine the confidence of the verdict. Id. at 1203-1204. This Court found that the record showed that defendant was aware of the other crimes and that the evidence in question was both favorable and unfavorable. Id.

The Archer Court considered the fact that Appellant was aware of the evidence in its analysis of whether it would have put the case in such a light at to undermine the verdict. In the case at bar, Appellant's counsel knew of the victim's workers compensation claim and even made some effort to obtain information directly from the carrier prior to trial. (T. 628-632). Therefore this Court should consider Appellant's apparent knowledge of the claim when evaluating whether the absence of the letter would have placed the case in such a different light as to undermine the verdict.

In Wright v. State, 857 So. 2d 861,870 (Fla. 2003), the defense argued that the state withheld information contained in

police files of other suspects and the neighborhood's criminal activity. This Court found that the prosecution was not required to provide defendant with all its investigatory work, but even if the State should have disclosed it, defendant failed to demonstrate that he was prejudiced. Id. This Court held that the mere possibility that undisclosed items may have been some help to the defense does not constitute constitutional materiality. (*internal citations omitted*). Similarly, in the case at bar, the mere possibility that the amount of benefits paid by the victim's workers compensation carrier *may* have had some impeachment value, could not raise the claim to the level of constitutional materiality.

In Maharaj v. State, 778 So. 2d 944,954 (Fla. 2001),defendant argued that the State violated Brady by suppressing evidence found in the victim's brief case. The trial court found that the record showed that trial counsel was aware of the items both before and during trial, that it would not have impeached the testimony of the state's key witnesses and would not have resulted in a markedly weaker case for the prosecution. Id. This Court agreed, holding that the evidence did not fall within the category of Brady material because it does not meet the materiality prong of the test and because both the prosecutor and defense were aware of the information. Id.

Likewise, in the case at bar, this Court should find no

violation, because Appellant knew about the claim and evidence in question was not material. The workers compensation letter was not material because it would not have had any impact on the credibility of the victim, Jerry Fitzpatrick. Even if the defense would have pursued this avenue of impeachment, the evidence adduced at trial was overwhelming that the Fitzpatrick suffered serious injuries when he attempted to remove Appellant and co-defendant from the bar because they were overly drunk and would not voluntarily leave.

When arguing the discovery violation to the trial court, defense counsel stated that had he received the letter pre trial he would have confronted Fitzpatrick with the amounts paid and argued that he benefited from those payments and lied about being the aggressor for financial gain (T. 628-629). The only evidence that supports Appellant's claim that Fitzpatrick was the aggressor was the self serving testimony of Appellant and Co-Defendant. Further, there was no evidence to support the argument that Fitzpatrick lied for financial gain as his trial testimony matched the statement he told police on the night of the crime, before he filed any claim for benefits. (R. 1-2).

As Petitioner notes, the jury returned a verdict for the lesser included offense of battery. The State would suggest that had defense counsel brought the amount of medical bills to the attention of the jury, it would have only served to highlight the severity of the victim's injuries, likely causing them to find Appellant guilty of the higher charge of aggravated battery.

Further, as the State argued below, defense counsel's suggestion that Fitzpatrick somehow "benefited" from severe injuries he suffered "on the job" is meritless. A plain reading of the letter certainly does not suggest in any way that Fitzgerald's claim was suspect or subject to the outcome of Appellant's trial or that he was profiting from the claim. It was simply a list of the amount of benefits paid to date and a request for information about restitution. The inclusion of the victim's medical bills would have added nothing to the defense, at a risk of making the victim more sympathetic.

Finally, when the alleged discovery violation is considered in the context of the entire trial, its omission could not have possibly resulted in prejudice in light of the overwhelming amount of evidence adduced at trial proving Appellant's guilt beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Although Appellant denied being drunk, he acknowledged having several beers that evening at three different establishments and Sam Berkowitz testified that he was the "designated driver" because Appellant and Stewart planned to drink too much (T. 353-355;372;419). Eye witnesses testified that Appellant and co-defendant Stewart were acting drunk and disruptive prior to being asked to leave by the victim, Jerry Fitzpatrick, the bar's security guard. (Steffan: T. 55-56; Fitzpatrick: 153,176; David: T. 233-235; Guyon: 277; Vaughn: 309-312).

The physical altercation began when Stewart refused to voluntarily leave the bar, ordered another drink and became

verbally abusive to Fitzpatrick. (T. 153-154;172,173; 177;183). Appellant told Dominique Steffan that Fitzpatrick "got what he deserved" because he was trying to throw them out before last call (T. 59-61). Stewart was upset that other bar patrons had not been asked to leave (T. Fitzpatrick: 154; Appellant: 358-359; Stewart: 438).

As Fitzgerald was escorting Stewart by the arm to the door, Appellant joined the fight by striking Fitzgerald from behind with a bar stool (T. 155). Other witnesses testified to seeing Appellant kick and punch Fitzgerald and described the fight as "two against one: Appellant and Stewart against Fitzgerald (T. Steffan T. 57-63; 84-96;236-237;259; Vaughn: 310-311). Appellant testified that he kneed and punched Fitzpatrick in the head, when he thought Fitzpatrick was "getting the better of" Stewart (T.362). Stewart testified that Appellant punched Fitzgerald in the head and kneed him (T.440).

Several witnesses testified that Appellant struck Fitzgerald in the back or the back of the head with a bar stool (T. Steffan T. 57-62; Fitzpatrick 155-156,164; David 236; Guyon T. 278; Vaughn T. 310-313). Appellant testified that he kneed and punched Fitzpatrick in the head, while he was fighting with Stewart (T. 362).

The victim, his treating doctor and several witnesses testified concerning, the nature of the injuries he sustained in the fight. (Steffan: T.65-68; Officer Barbre: T. 106-107; Dr. Hal Tobias: T. 124-143; Fitzpatrick: T. 160-164, 188-190; 207;226; Guyon: 279; Vaughn T. 314.326).

It is also important to consider the limited content of the letter in question, as its content is limited to the amounts paid by the carrier for medical bills and lost wages and asks the State to seek restitution should they obtain a conviction. (T. 221-222). The letter does not infer that Fitzgerald's claim was being questioned by the carrier, nor did it infer that his benefits were dependant on the outcome of Appellant's trial. As discussed above, Appellant was fully aware of the claim and could have discovered the amount paid on the claim(T. 628-631).

Appellant also argues that the absence of the letter was made worse by the prosecutor's closing argument wherein she argued that "none of the witnesses had a stake in the outcome." The standard when reviewing prosecutorial comments is set forth in Breedlove v. State, 413 So.2d 1, 8 (Fla.1982), as follows:

> Wide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Each case must be considered on its own merits, however, and within the circumstances surrounding the complained-of remarks.

Id. (citations omitted).

The Supreme Court explained the proper parameters of closing argument in Bertolotti v. State, 476 So.2d 130 (Fla.1985):

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may

> reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Id. at 134.

The State argues that the prosecutor's comment in closing argument was proper as it was a fair inference drawn from the evidence adduced at trial. When this comment is considered in the light of all the evidence adduced at trial and in the context of the entire closing argument, the comment could not have possibly misled or inflamed the jury, nor could it have affected the outcome of the trial.

Based on the foregoing arguments, the State respectfully requests that this Court affirm Appellant's conviction.

II. THE DISTRICT COURT ERR WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF THE DEFENSE MOTION FOR PRODUCTION OF THE VICTIM'S DRUG REHABILITATION RECORDS.

The Fourth District affirmed this issue without comment and Appellant did not seek the Discretionary Jurisdiction from this Court on this Issue. Therefore, the State would respectfully argue that this Court should not consider this issue. However, should this Court wish to address this issue, the State argues that the District Court's decision should be affirmed.

Standard of Review

A trial court's ruling on the relevancy of evidence and whether or not the probative value is outweighed by the danger of unfair prejudice is governed by an abuse of discretion standard of review. Williamson v. State, 681 So. 2d 688, 696 (Fla. 1996). Evidence may be excluded under Section 90.403, Florida Statutes

(2004), which provides that evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This Court has held that evidence of drug use is not admissible for impeachment unless it is relevant to the time of the crime or that if affected the witness's ability to observe or perceive events. Edwards v. State, 548 So. 2d 656 (Fla. 1989).

Here, defense counsel sought to impeach the victim with medical records from drug rehabilitation treatment he received *after* the crime occurred. Appellant argues that the records were relevant because the victim testified that he had taken pain medication for a period of time prior to the crime for an unrelated injury, that he had taken pain medication on the day of the crime and that he attributed his need for drug rehabilitation to the memory loss he suffered in the fight with Appellant and co-defendant. The State argues that because the these records only concern the nature and treatment of the victim's injuries and not the cause of the injuries (i.e. the crime in question), the records would only serve as improper bad character evidence against the victim while providing no relevant evidence on the issue of how or by whom the injury was caused.

Impeachment evidence may be inadmissible if it unfairly prejudices or misleads the trier of fact and inquiry into

collateral matters, which do not promote the interests of justice, should not be permitted if it is unjust to the witness and uncalled for by the circumstances. Breedlove v. State, 580 So. 2d 605, 609 (Fla. 1991). In the case at bar, the victim's injuries and symptoms were well established at trial through his own testimony, the testimony of co-workers who knew him before and after the crime, and his treating physician. Therefore, any relevant information found in these records would have been cumulative.

Further, defense counsel thoroughly cross examined the victim on his history with pain medication and argued that the victim was abusing drugs during closing argument, although there was no evidence to link his prior drug use with the post crime drug rehabilitation. (T. 164-226; 550). When the victim's testimony in viewed in context with the other evidence presented and in the context of the State's closing argument it is clear that the State did not make his memory loss a feature of the trial.

Finally, should this Court find that the trial court abused its discretion by denying the defense request for these records, the State argues that any error was harmless beyond a reasonable doubt in light of the overwhelming evidence adduced at trial which proved Appellant's guilty beyond a reasonable doubt. *See* State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court Affirm the Fourth District's Opinion in this Case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Law Offices of Paul Morris, P.A., 9130 South Dadeland Boulevard, Suite #1528, Miami, Florida on this 6th day of March, 2008.

_____

Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Florida Rule of Appellate Procedure 9.210, counsel for the State of Florida, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

_____

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