IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502017AP000101AXXXMB
L.T. NO.: 502017MM001819AXXXMB

JESSIE JAMES SHANNON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: JUL 2 6 2018

Appeal from the County Court in and for Palm Beach County,
Judge Bradley Harper.

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PER CURIAM.

Appellant Jessie James Shannon appeals his convictions for one count of Resisting an Officer without Violence and one count of Leaving the Scene of a Crash Involving Damage. Appellant claims the State's failure to disclose certain statements prior to trial prejudiced his trial preparation and defense strategy, and that a new trial is required. For the reasons that follow, we disagree and affirm.

I.

Appellant was charged with one count of Battery, one count of Resisting an Officer without Violence, and one count of Leaving the Scene of a Crash Involving Damage. The facts elicited at trial were as follows. On February 13, 2017, at around 8:20 A.M., Appellant was driving east on 10th Avenue in Lake Worth when he crashed into two different vehicles. Appellant first hit the rear corner and passenger side of one vehicle as it was turning left into a gas station, and then proceeded to crash into the rear-end of another vehicle about a block away from the initial collision. Appellant exited his vehicle at the scene of the second accident and thereafter became engaged in a physical altercation with another man at the scene.

Detective Juan Montoya of the Boynton Beach Police Department was also driving eastbound on 10th Avenue that morning and observed the accident from his unmarked patrol vehicle. Detective Montoya, who was off-duty at the time, activated his lights and sirens and turned back toward the scene. Upon arrival, Detective Montoya identified himself as a police officer, observed Appellant fighting with the other man, and with the help of several bystanders, successfully pulled the combatants apart. While Detective Montoya was attempting to restrain Appellant, Appellant said, "I'm going to go get my gun, I'm going to go get my gun," and attempted to access the trunk of his vehicle. But Appellant was unsuccessful because he was being physically restrained by Detective Montoya, and a "tussle" between the two ensued until Palm Beach County Sheriff Deputies arrived on scene.

When Deputy Sheriff Connor Haugh arrived, he immediately recognized Detective Montoya, who was signaling to Deputy Haugh that Appellant needed to be handcuffed. Deputy Haugh commanded Appellant to the ground several times, warning him that he would be tazed if he did not comply. Appellant responded by cursing at Deputy Haugh and telling Deputy Haugh

to taze him. Deputy Haugh then tazed Appellant and placed him under arrest. No gun was ever found in Appellant's possession or recovered from the scene.

II.

Appellant was charged with Battery (on Detective Montoya), Resisting an Officer without Violence (Deputy Haugh), and Leaving the Scene of a Crash Involving Damage (relating to the first accident). The case proceeded to trial, but the jury was unable to reach a verdict and a mistrial was declared.

In Appellant's second trial, Detective Montoya testified that in addition to the comments about "going to get [his] gun," Appellant had also stated, "I'm going to get him, I'm going to fucking kill him, I'm going to kill him." Defense counsel objected, arguing that this statement was not disclosed to the defense and constitutes evidence of other crimes, wrongs, or bad acts, but the trial court overruled the objection. On cross-examination, defense counsel questioned Detective Montoya about the statement, and Detective Montoya acknowledged that he did not include the statement in his written report. Defense counsel also questioned Detective Montoya about whether he had testified about this statement during the previous trial, to which Detective Montoya responded that he could not recall.[1]

The following morning, prior to the resumption of trial, Appellant requested the court conduct a *Richardson*[2] hearing, again arguing that the State had committed a discovery violation and that the undisclosed statements were improper evidence of uncharged crimes, wrongs, or bad acts. The trial court conducted a *Richardson* hearing, finding that there was a discovery violation, but that the violation was inadvertent and trivial. As to whether the violation

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[1] The State later acknowledged that the statements did not come out during Detective Montoya's testimony in the first trial.

[2] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

prejudiced Appellant's ability to prepare for trial, defense counsel argued that she would have prepared additional motions in limine, addressed the statements in opening, and tailored her cross-examination to address the validity of the statements, the circumstances under which they were made, and Detective Montoya's motivation in testifying to them. The State countered that the statements elicited were very similar to the statements Appellant made about getting the gun, and did not require additional preparation. The State argued that the only thing defense counsel could have done with knowledge of the additional statement was impeach Detective Montoya, which is exactly what defense counsel did.

The trial court agreed with the State, ruling that Appellant was not procedurally prejudiced by the State's discovery violation. The court noted that defense counsel was able to question Detective Montoya about the statement on cross-examination at length and to impeach him with his written report. The court further noted that it permitted defense counsel to impeach Detective Montoya with his prior testimony even though defense counsel did not have a transcript of that proceeding.

After the State rested, Appellant testified on his own behalf that he never mentioned a gun that day, nor was there a gun in his car. Appellant did not address the previously undisclosed statement about intending to kill someone, and neither did the State during closing arguments, though defense counsel did mention them during her closing to call Detective Montoya's credibility into question for testifying to them.

At the conclusion of the trial, the jury returned a verdict of not guilty on the Battery charge and guilty on the Resisting an Officer without Violence and Leaving the Scene of a Crash Involving Damage charges. This appeal follows.

III.

We review a trial court's determination of a discovery violation for an abuse of discretion. *German v. State*, 199 So. 3d 936, 939 (Fla. 4th DCA 2016) (citing *Tobin v. Tobin*, 117 So. 3d 893, 895 (Fla. 4th DCA 2013)). When an appellant claims that a trial court erred in its determination of an alleged discovery violation, the reviewing court must undertake a two-step inquiry. First, the reviewing court must determine whether a discovery violation has, indeed, taken place. *Curry v. State*, 1 So. 3d 394, 398 (Fla. 1st DCA 2009). If the reviewing court finds that a violation has taken place, it must then determine whether any error in the trial court's determination of the issue was harmless. *Id.* at 399.

1. Whether the State Committed a Discovery Violation When it Failed to Disclose Oral Statements Made by Appellant Prior to Trial.

We agree with the trial court's conclusion that the State committed a discovery violation when it failed to disclose Appellant's oral statement, "I'm going to get him, I'm going to fucking kill him, I'm going to kill him." Florida Rule of Criminal Procedure 3.220(b) imposes (in pertinent part) the following discovery obligations on the State:

> (1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control . . . :
>
> . . .
>
> (C) any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements . . . .

(emphasis added). Florida Rule of Criminal Procedure 3.220(j) further imposes on the State "a continuing duty to disclose evidence," which includes evidence "held by other state agents, such

as law enforcement officers." *Rojas v. State*, 904 So. 2d 598, 600 (Fla. 5th DCA 2005) (citing *Whites v. State*, 730 So. 2d 762 (Fla. 5th DCA 1999)).

As acknowledged by the State, Appellant's oral statement was never disclosed to the defense prior to either trial, nor did it come out in Detective Montoya's testimony in the previous trial. While the prosecutor represented she was unaware of the statement, her actual knowledge of the statement is immaterial because under *Rojas v. State*, the prosecution is charged with constructive knowledge and possession of all information and evidence in the hands of State agents, including police. *Rojas*, 904 So. 2d at 600. Accordingly, we find the trial court properly concluded the State committed a discovery violation.

2. Whether the Trial Court Abused its Discretion in Determining the State's Discovery Violation was Harmless.

Because we have found that the State committed a discovery violation, we must next determine whether that violation was harmless. *Curry*, 1 So. 3d at 398. The standard for finding a discovery violation harmless is "extremely high." *Cox v. State*, 819 So. 2d 705, 712 (Fla. 2002) (quoting *Pomeranz v. State*, 703 So. 2d 465, 468 (Fla. 1997)). In making that determination, the appropriate inquiry is whether the State's discovery violation procedurally prejudiced the defense.

In *State v. Schopp*, 653 So. 2d 1016, 1019 (Fla. 1995), the Florida Supreme Court made clear that "[t]he question of 'prejudice' in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder but rather upon its impact on the defendant's ability to prepare for trial." (quoting *Smith v. State*, 500 So. 2d 125, 126 (Fla. 1986)). In conducting this analysis, the court should analyze whether the defense's "trial preparation or strategy" would have been materially different had the defendant the benefit of the missing discovery. *Scipio v. State*, 928 So. 2d 1138, 1147 (Fla. 2006). "Trial preparation or

strategy should be considered materially different if it reasonably could have benefitted the defendant." *Id.* (quoting *Schopp*, 653 So. 2d at 1020). Only when the reviewing court "can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." *Id.* (quoting *Schopp*, 653 So. 2d at 1021).

Under the facts of this case, we are satisfied that the State's discovery violation did not procedurally prejudice the defense. Appellant's main theory of defense to the Battery and Resisting an Officer without Violence charges was self-defense. Specifically, Appellant testified, and defense counsel argued, that Appellant was scared and confused during the incident and was acting in self-preservation by defending himself when he was hit by a bystander and aggressively handled by Detective Montoya. We do not find it "reasonably probable" that the defense strategy here would have been different had Appellant known about the undisclosed statement. *Cox*, 819 So. 2d at 712.

First, we find the statement, "I'm going to go get my gun," which was properly admitted at trial, and the undisclosed statement, "I'm going to fucking kill him," to be of a similar nature, and carry the same implications when yelled in succession during an altercation. It is unlikely that Appellant would have changed his theory of defense had the additional statement been disclosed prior to trial.

To the extent Appellant argues he would have filed a Motion in Limine to exclude the statement, we note that such a motion would properly be denied because the statement was inextricably intertwined with the manner in which the charged offenses took place. *See, e.g.*, *Gale v. State*, 93 So. 3d 508, 509 (Fla. 4th DCA 2012) ("Evidence necessary to describe the manner in which a criminal offense took place or how it came to light is generally admissible as relevant evidence even though it might otherwise be objectionable as prior bad act evidence

because it is 'inextricably intertwined' with the underlying crime." (quoting *Shively v. State*, 752 So. 2d 84, 85 (Fla. 5th DCA 2000)); *see also Scipio*, 928 So. 2d at 1147 ("Trial preparation or strategy should be considered materially different if it reasonably could have benefitted the defendant." (quoting *Schopp*, 653 So. 2d at 1020)). As we find the statement was admissible, Appellant's only option would have been to impeach Detective Montoya, and here Appellant cross-examined Detective Montoya extensively on the undisclosed statement, and was allowed leeway in his impeachment by both the trial court and the State. Finally, the State did not discuss the statement for the remainder of the trial or during its closing arguments, and we are thus satisfied the undisclosed statements were not made a feature of the trial.[3] *See Wright v. State*, 19 So. 3d 277, 293 (Fla. 2009) (stating even when inextricably intertwined, collateral evidence cannot become a feature of the trial).

For the reasons discussed herein, we find that Appellant was not procedurally prejudiced by the State's discovery violation, and that the trial court therefore did not abuse its discretion by finding the State's discovery violation harmless. Accordingly, we AFFIRM Appellant's convictions.

FEUER, VOLKER, and SUSKAUER, JJ., concur.

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[3] While not determinative, we also note that the jury found Appellant not guilty on the Battery count, perhaps showing that it did not place significant reliance on that portion of Detective Montoya's testimony.

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STATE OF FLORIDA,
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Opinion/Decision filed: JUL 26 2018

Appeal from County Court in and for
Palm Beach County, Florida;
Judge Bradley Harper

Appealed: July 21, 2017

_____/

DATE OF PANEL: MAY 22, 2018

PANEL JUDGES: FEUER, VOLKER, SUSKAUER

AFFIRMED/REVERSED/OTHER: AFFIRMED

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:	DISSENTING: With/Without Opinion	CONCURRING SPECIALLY: With/Without Opinion
DATE: 7/19/18	_____	_____
DATE: 7/19/18	_____	_____
DATE: 7/16/18	_____	_____