STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRES DAVID,

Defendant-Appellant.

UNPUBLISHED
September 13, 2007

No. 268460
Wayne Circuit Court
LC No. 05-008549-01

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 81 months to 20 years for the assault conviction and three to five years for the felon-in-possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We reverse and remand for proceedings consistent with this opinion.

On August 11, 2005, at approximately 10:00 p.m., the complainant was taking a break from his employment at the F & M Market when two individuals exited a vehicle. The men inquired about a money gram, and the complainant told them to go inside the market. The men entered the market and exited within a short period. The complainant testified that one man pulled a gun, put the gun at his stomach, and demanded money. He also indicated that defendant stood at his other side, did not pull a gun, but lifted his shirt where part of a gun was visible. The complainant told the men that he did not have any money and retreated to a nearby party store to call police.

Although an interpreter was not present to aid the complainant with his testimony, the defense noted during cross-examination that the witness was having difficulty answering the questions. For example, the complainant could not tell if the gun was placed at his side, in his stomach, or at his back. The trial court stated that only the defense attorney was having difficulty understanding the witness, and the location of the gun, in the side or stomach, "doesn't matter." However, when defense counsel tried to elicit additional answers to questions on cross-examination, the witness was nonresponsive to the questions, insisted that he was scared, and directed the parties to view the videotape of the crime because the market had three operating

cameras. The complainant further testified that he was able to identify the "skinny guy", defendant's accomplice, when he saw photographs at the police station.

Investigator Samuel Mackie testified that he responded to the scene, and he was able to observe portions of the incident recorded by the surveillance equipment. The video was digital and downloaded to a hard drive, and therefore, only parts of the video could be viewed at that time. The officer recognized defendant from the portions of the video that he observed. The defense was unable to view the market surveillance video before trial because special equipment was required. The trial court refused to adjourn the trial, but allowed the parties a continuance *during trial* to view the video.

The next day, trial continued. When the trial judge took the bench, he stated that a deputy told him that defendant wanted to plead guilty. The trial court stated that the decision to accept a plea offer belonged to the defendant, not the attorney. The trial court indicated that defense counsel did not convey the desire to plead guilty, and therefore, the trial court had to directly ask defendant. Upon questioning, defendant denied the communication to the deputy. In light of the answer, defense counsel moved to recuse the trial court. Defense counsel then placed on the record that, prior to the commencement of trial, he had requested an adjournment because of the inability to view discovery, the video from the market. His request was refused, and his request to have the matter reviewed by the chief judge was also refused. The defense then cited the ex parte communication between the trial court and the deputy as another basis for recusal; particularly in light of the trial court's accusation that defense counsel did not convey the plea offer to defendant. Defense counsel moved for a mistrial, and the trial court denied the motion. Defense counsel indicated that he was taking the issue to the chief judge. In response, the trial court advised defense counsel:

> I am going to file a grievance against – no, no, no. You can't leave. You sit down. You're going to finish the trial. Sit down.

The trial court then inquired of the deputy whether defendant stated that he wanted to plead guilty, and in response, the deputy stated: "He wanted to talk to his lawyer." The trial court indicated that there was no prejudice because defendant answered "no" to the inquiry regarding a guilty plea. Defense counsel then advised the court that defendant was "now totally frightened. He wants to take the cop [sic]. He's going to take the offer." The trial court refused to accept a plea. When defense counsel indicated that he could not finish the trial under the circumstances, the trial court stated: "[Defense counsel], you're going to sit down and shut up. That's all you're going to do. Now put it [the video] on, and let me see it. Sit down. You don't run this court, I do." The deputy then ensured that defense counsel did not leave the courtroom.

The video from the market was played for the defense and the trial court.[1] On the record, it was asserted that, contrary to the testimony of the complainant, the men were not standing close to the complainant, and there was no indication that defendant lifted his shirt to display a

[1] Although the video was admitted as an exhibit at trial, it is not preserved in the lower court record for our review.

gun on the videotape. After the incident involving the communication with the deputy and the viewing of the tape, defendant repeatedly expressed his desire to accept the plea offer, but the trial court refused. After hearing the testimony of various police witnesses, the defense moved to recall the complainant for cross-examination following the review of the video. The trial court refused to allow the complainant to be recalled, stating that it had excused the witness from further testimony. Defense counsel indicated that the witness had not been excused because the parties agreed that he could be recalled following review of the evidence. It was asserted that the prosecuting attorney advised defense counsel that the witness would be available if called. The trial court then advised defense counsel that he could recall the witness, who was not currently present, but then refused to grant an adjournment or continuance for the witness to appear and testify. Defendant was convicted as charged and appeals as of right. We reverse.

Defendant alleges that he was denied due process when the trial court refused to allow him to recall the complaining witness after the surveillance video of the incident was available for review and refused to allow a brief continuance to recall the witness.[2] We agree. The trial court's decision to grant a continuance is reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1992). Constitutional issues are reviewed de novo. *People v Jones*, 260 Mich App 424, 427; 678 NW2d 627 (2004). There is an aspect of the Confrontation Clause, US Const, Amend VI, which guarantees a defendant the reasonable opportunity to test the truth of a witness' testimony. *People v Slovinsky*, 166 Mich App 158, 169; 420 NW2d 145 (1988). The right to confront and cross-examine witnesses and call witnesses on one's behalf are critical aspects of due process. *Id*. at 180. A restriction or denial of the right must be closely examined to determine that there is a competing state interest that mandates the limitation. *Id*. at 181. In *People v Lester*, 232 Mich App 262, 281-283; 591 NW2d 267 (1998), this Court discussed the withholding of discovery evidence as applied to impeachment evidence:

> A criminal defendant has a due process right of access to certain information possessed by the prosecution. [*Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).] This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt. Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence "may make the difference between conviction and acquittal."

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[2] Although defense counsel presented a litany of issues for our review, we conclude that the due process argument is dispositive. Defendant also asserted that the verdict was against the great weight of the evidence and the sufficiency of the evidence. However, the trier of fact may convict based on the credibility of the victim's testimony without further corroboration. See *People v Jones*, 193 Mich App 551, 554; 484 NW2d 688 (1992), rev'd on other grounds, 443 Mich 88 (1992). The defense was never given the opportunity to attack the credibility of the complaining witness through the use of the videotape and impeach his testimony. Moreover, the complainant in this case repeatedly refused to answer the questions posed by defense counsel and directed defense counsel to the video, asserting that it established the validity of his testimony. On remand, the parties may wish to determine if the complainant is capable of answering the questions posed or would require an interpreter to respond to questioning.

> Due process does not require the prosecutor to allow complete discovery of his files as a matter of practice. However, the prosecutor is under a duty to disclose any information that would materially affect the credibility of his witnesses.
>
> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.
>
> The failure to disclose impeachment evidence does not require automatic reversal, even where, as in the present situation, the prosecution's case depends largely on the credibility of a particular witness. The court must still find the evidence material. Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Accordingly, undisclosed evidence will be deemed material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *In determining the materiality of undisclosed information, a reviewing court must consider any adverse effect on the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case*.
>
> In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case. In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. [Citations omitted and emphasis added.]

In the present situation, the posture of the case deprived defendant of due process of law. Although the prosecutor and defense agreed that there was no willful withholding of discovery, the discovery was incapable of being examined because the defense did not have the special equipment required to review the videotape. Police witnesses testified that there was a special program available to view the video, but it was not presented to defense counsel with the video. Therefore, before trial began, the defense attorney was not in a position to advise defendant of the propriety of accepting a plea offer or being able to refute the testimony of the key and only witness. Under the circumstances, the trial court abused its discretion in failing to grant a brief adjournment prior to trial to allow the defense to view the video of the incident. *Echavarria, supra*. On the record, the complaining witness testified that the two men were close to him and displayed weapons. The defense theory of the case was that the witness was scared and not in a position to examine what defendant had on his person, which may have been a cellular telephone. Moreover, when viewed, it was discovered that the videotape did not display

defendant and his alleged accomplice next to the witness as he testified. Further, there was no evidence on the videotape that defendant lifted his shirt to display any item to the witness. The video that was disclosed to the defense at trial was material evidence that impacted the ability of the defense to present its case. *Lester, supra*. Because defendant was denied due process of law when he was deprived of the opportunity to recall and cross-examine the complainant, a new trial is appropriate. *Slovinsky, supra*.[3]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

[3] In light of our holding that defendant was denied due process of law, we need not address the ex parte communication between the trial judge and the deputy and the exchange between the trial judge and defense counsel regarding the communication of the plea offer. However, a new judge must preside over the retrial to give defendant the benefit of a completely clear record. See *People v Strodder*, 394 Mich 193, 221; 229 NW2d 318 (1975) (Williams, J.).