FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 23, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. Mark Shane Beaulieu, Defendant and Appellant.	)	Supreme Court No. 20150345 McKenzie Co. No. 27-2013-CR-01007

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM ORDER DENYING MOTION FOR NEW TRIAL AND JURY VERDICT

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE ROBIN A. SCHMIDT, RULING JUDGE
HONORABLE ALAN SCHMALENBERGER, SURROGATE TRIAL JUDGE

Charles B. Neff Jr. (ND # 06406)
McKenzie County Assistant State's Attorney
201 5th St NW, Ste 550
Watford City, ND 58854
(701) 444-3733
mcsa@co.mckenzie.nd.us

Attorney for Plaintiff-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

North Dakota cases

Cases from other jurisdictions

Rules

Secondary Sources

STATEMENT OF THE ISSUES

[¶1] The rules of criminal procedure do not require a new judge to certify knowledge after taking over a case after verdict.

[¶2] The booking photo is not a *Brady* violation nor obvious error, and does not warrant a new trial.

STATEMENT OF THE CASE

[¶3] The State would agree with the Statement of the Case as laid out by Respondent-Defendant, except the year in ¶ 11 should be 2015.

STATEMENT OF THE FACTS

[¶4] The State would agree with the facts as stated by the Respondent-Defendant, except for the facts that were adduced at trial. At trial, the State called Deputy Travis Bateman. He testified he was called out to a fight behind the bars of Main Street in Watford City. Tr. p. 19, l. 14-19. Upon arrival, the Defendant was pointed out to the deputy by others in the area. Tr. p. 21, l. 1-5. Deputy Bateman instructed the Defendant multiple times to stop and even activated his squad lights. Tr. p. 21, l. 6-18; p. 22, l. 9-16. The Defendant turned his back to the deputy and continued to walk away from the deputy, causing him to engage the Defendant. Tr. p. 22, l. 18-22; p. 31, l. 22-25; p. 32, l. 1-4. The Defendant took an aggressive stance towards the deputy right before engagement, causing Deputy Bateman to step into him. Tr. p. 22, l. 24-25; p. 27, l. 19-21. This action caused him to trip and the Defendant ended up on the ground on his back with the deputy on top. Tr. p. 23, l. 1-6; p. 29, l. 9-10; p. 32, l. 15-19; p. 53, l. 21-25. During the interaction, Deputy Bateman noted that the Defendant's face was bloodied and a bloodied shirt. Tr. p. 25, l. 18-23; p. 53, l. 3-5. Deputy Bateman testified that the ground at the time was wet. Tr. p. 30, l. 1-3; p. 54, l. 8-12. The Defendant was arrested and brought to the McKenzie County jail, where was he later booked. Tr. p. 52, l. 10-20.

[¶5] The Defendant took the stand testified he was behind the bar on Main Street in Watford City. Tr. 41, l. 15-20. He was walking home, not hearing Deputy

Bateman's commands, lights, or sirens. Tr. 42, l. 1-18. The Defendant stated he was tackled to the ground face down into a mud puddle by Deputy Bateman. Tr. 43, l. 1-11, 19-20. He stated that the blood on his face came from hitting the ground face first. Tr. 48, l. 7-17. He stated that he had abrasions everywhere. Tr. 48, l. 18-19. The Defendant testified at the jail that there were pictures taken of his injuries. Tr. p. 48, l. 22-25; p. 49, l. 1-2.

STANDARD OF REVIEW

[¶6] "Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law." Id. (citation omitted). This Court reviews constitutional rights violations under the de novo standard of review. Beylund v. Levi, 2015 ND 18, ¶ 8, 859 N.W.2d 403." State v. Williams, 2015 ND 103, ¶ 5, 862 N.W.2d 831.

ARGUMENT

I. No certification is necessary under the N.D. Rules of Criminal Procedure

[¶7] North Dakota Rule of Criminal Procedure 25 deals with a successor judge in criminal trials. As the succeeding judge in this case took over after verdict, only subsection b is used. Subsection B has no certification requirement like subsection A. All that is required is that the original judge "cannot perform those duties because of termination of office, absence, death, sickness, or other disability." Id. In this case, Surrogate Judge Schmalenberger's assignment ceased while the motion for new trial was pending. Thus, Judge Schmidt, as a judge

regularly sitting in or assigned to the court" took over the case. The rule as laid out was followed. To now require certification not only when replacing a judge mid-trial, which makes sense, but to require said certification on motions following trial would be to amend the rules outside of the normal rule-making process of this court. Besides which, the Defendant admits in his brief that it is clear in the order denying the motion for new trial that Judge Schmidt became familiar with the case by listening to the recording. The rules are created for a reason and were properly followed in this case.

II. The booking photo is not a *Brady* violation nor obvious error, and does not warrant a new trial

[¶8] "A defendant seeking a new trial for newly discovered evidence must show (1) the evidence was discovered after trial; (2) the failure to learn about it beforehand was not from defendant's lack of diligence; (3) the new evidence is material to the trial; and (4) the quality and weight of the new evidence would likely produce an acquittal. State v. Thiel, 515 N.W.2d 186 (N.D.1994). A defendant's failure to discover evidence from a lack of diligence also defeats a Brady claim that the prosecution withheld that evidence." State v. Sievers, 543 N.W.2d 491, 495 (N.D. 1996). "To establish a Brady violation, a defendant must show (1) the government possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) a

reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed. United States v. Meros, 866 F.2d 1304 (11th Cir.1989). See 8 Moore's Federal Practice ¶ 16.06 [1] (1995). The Brady rule does not apply to evidence the defendant could have obtained with reasonable diligence. Meros; United States v. Boling, 869 F.2d 965 (6th Cir.1989); United States v. Valera, 845 F.2d 923 (11th Cir.1988); United States v. Newman, 849 F.2d 156 (5th Cir.1988). See 8 Moore's Federal Practice at ¶ 16.06[1]; 2 Orfield's Criminal Procedure Under the Federal Rules ¶ 16.12 (2nd ed.1985)." Sievers, 543 N.W.2d at 496.

[¶9] At the outset, as the *Brady* issue was not raised with the lower court, it should not be considered on appeal. Even if this issue is analyzed, it should be done under obvious error. "Issues that are not raised before the district court, including constitutional issues, 'generally will not be addressed on appeal unless the alleged error rises to the level of obvious error under N.D.R.Crim.P. 52(b).' " State v. Addai, 2010 ND 29, ¶ 49, 778 N.W.2d 555 (quoting State v. Parisien, 2005 ND 152, ¶ 17, 703 N.W.2d 306). To establish obvious error, the defendant has the burden of proving plain error that affects his substantial rights. Addai, at ¶ 49. "Only constitutional error that is 'egregious' or 'grave' is subject to the obvious error rule." Id. (quoting Parisien, at ¶ 17)." State v. Chatman, 2015 ND 296, ¶ 22, 872 N.W.2d 595, *reh'g denied* (Feb. 18, 2016). This court is cautious when viewing obvious error and only in exceptional cases where there is a serious injustice

suffered. State v. Costa, 2016 ND 65, ¶ 16 (citing to State v. Schmidkunz, 2006 ND 192, ¶ 6, 721. N.W.2d 387.) Even then, this court has discretion to correct the error and only where it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Costa at ¶ 17.

[¶10] There is no obvious error in this case, as any error was not egregious or grave. The error in question was the booking photo. As further explained below, this booking photo could have been obtained through reasonable diligence by the defendant as the defendant was aware that a photo was taken and it is common knowledge that photos are taken during booking, which can be imputed on the defense attorney. Also, the booking photo itself as at best impeachment because it shows an injury to the fact which both witnesses stated was present. There is nothing from the lack of a booking photo that so seriously calls into question the integrity, fairness, or public reputation as to warrant reversal under obvious error.

[¶11] If this court were to find the issue was adequately raised below, the lower court should still be affirmed. In this case, the evidence at issue is the booking photo taken the night of the incident. The Defendant claims that this is newly discovered evidence that warrants a new trial. But the booking photo could have been obtained by the Defendant through reasonable diligence. The Defendant himself testified at trial that at least one photo was taken of him, and presumably he was present and remembered being booked into the jail. Tr. p. 48, l. 22-25; p.

49, l. 1-2. So the Defendant was aware of the existence of such photos. As the defense attorney in this case is a seasoned criminal defense attorney, he would be familiar with the booking procedure and the availability of those photos. No less than the Supreme Court of Montana has held that failure to disclose booking photos does not implicate a *Brady* violation. (See "The district court found that both parties knew prior to trial that the assault victim had been arrested the night of the incident and it was common knowledge that booking photos are taken of persons who are arrested. Id. at ¶ 33. In James, we concluded that since counsel for the defendant was generally familiar with booking procedures, counsel was constructively aware that a booking photo was probably in existence. Id. at¶¶ 33-36." State v. Parrish, 2010 MT 212, ¶ 18, 357 Mont. 477, 480-81, 241 P.3d 1041, 1044 (citing to State v. James, 2010 MT 175, 357 Mont. 193, 237 P.3d 672.) Defense counsel admits in his brief that he must have known that booking photos were taken and only then made an effort to secure said photo. All of this could have been done prior to trial with reasonable diligence on the part of the defense. On that factor alone, there is no *Brady* violation.

[¶12] Further, the booking photo at issue isn't exculpatory and there is no reasonable probability that the outcome would have been different. "The undisclosed material must be plainly exculpatory; Brady does not apply to evidence that might have been exculpatory. See State v. Steffes, 500 N.W.2d 608, 613 (N.D.1993) ("Brady materials are plainly exculpatory and no inference is

required."). There is no Brady violation if the defendant fails to demonstrate the evidence was favorable to him. See State v. Goulet, 1999 ND 80, ¶ 15, 593 N.W.2d 345." State v. Horn, 2014 ND 230, ¶ 21, 857 N.W.2d 77. The Defendant has failed to demonstrate that it is plainly exculpatory and favorable to him. As argued at the district court, it is undisputed that the Defendant's face was injured on the night in question. The dispute is how it was injured. The injuries were already present when he came on scene. Tr. p. 25, l. 18-23. The Defendant stated that it was injured when he was taken to the ground by the deputy. Tr. 48, l. 7-17. Because there is no question that his face was injured at the time of the booking photo, there is nothing exculpatory or favorable to the defendant in the booking photo itself. The appearance of injuries to the face doesn't discredit either witness.

[¶13] On appeal, for the first time, the Defendant states that a lack of blood on the shirt in the photograph is exculpatory because Deputy Bateman testified that the Defendant's shirt had blood on it during the incident. The problem with that is that the booking photo doesn't show the back of the shirt, nor does it show a majority of the front of the shirt, as it is covered by an identification plate. Even if this court were to consider this argument for the first time on appeal, it still isn't plainly exculpatory and favorable to him because the blood on the shirt falls under the "might have been exculpatory" category. It isn't clear in the photo whether there is blood on the shirt or not because there isn't much shirt to see in

the photo. It also isn't clear in the photo whether his shirt is wet or muddy, even though there was testimony he was lying in a puddle, whether on his face or back. Tr. p. 30, l. 1-3; p. 54, l. 8-12; p. 43, l. 1-11, 19-20. If the jury were to believe the Defendant, the portion of the shirt facing the camera would need to show wetness or muddiness, which it doesn't. This photo is not plainly exculpatory and is not favorable to the Defendant's case.

[¶14] Finally, to find a *Brady* violation, this court must find a reasonable probability that it would affect the verdict. This Court has defined reasonable probability as "a probability sufficient to undermine confidence in the outcome of the proceedings. Tweed v. State, 2010 ND 38, ¶ 26, 779 N.W.2d 667." Coppage v. State, 2014 ND 42, ¶ 17, 843 N.W.2d 291. Thus, the booking photo in question must show a probability that it would undermine the confidence of the jury verdict. As shown above, the booking photo doesn't reach that level. Even as impeachment evidence, it doesn't disturb the verdict of the jury. The jury was basically given two versions of events in this case, Deputy Bateman's and the Defendant's. Both versions include a portion where the Defendant's face is injured. Therefore, showing a photo taken later that night of injury to his face doesn't undermine the confidence in the verdict, as both stories include that detail. In regards to his shirt, there is no evidence that the shirt helps either party. While there is no blood on the shirt, there is also no indication that he was face down in a mud puddle, as he had testified. There could be blood or mud on the

portion of the shirt that isn't visible, but probably and could be aren't enough. There is also no testimony from the Defendant that he didn't bleed on his shirt, as his face was injured that night. There is no evidence that would show a reasonable probability that if this evidence were introduced, it would undermine the jury's conviction on Refusal to Halt.

[¶15] Because there was no *Brady* violation, this court simply looks at the standard for a motion for new trial. Because the *Brady* standard is lower than a motion for new trial, if this court doesn't find a *Brady* violation, logically the denial of a motion for a new trial should be affirmed. As stated above, the evidence in question could have been obtained by the defendant with reasonable diligence. The booking photo in question is not material as it simply goes to impeachment. This evidence also would not lead to an acquittal. It simply confirms the undisputed portions of both stories presented at trial. It doesn't affect which version of the events the jurors believed. The defendant was found guilty of Refusing to Halt. As the district court pointed out, the booking photo doesn't negate the elements of the offense, it is impeachment evidence at best. And impeachment evidence isn't enough to warrant a new trial.

CONCLUSION

[¶16] The denial for motion for a new trial should be affirmed and the jury verdict affirmed because the trial court didn't need to certify her familiarity with the record. Further, the lack of disclosure of the booking photo is not a *Brady* violation as it isn't

obvious error, could have been found with reasonable diligence, is not plainly exculpatory, and there is no reasonable probability that it would affect the verdict.

/s/ Charles B. Neff Jr.
Charles B. Neff Jr. (ND # 06406)
McKenzie County Asst. State's Attorney
201 5th St NW, Ste 550
Watford City, ND 58854
(701) 444-3733
mcsa@co.mckenzie.nd.us

Attorney for Plaintiff-Appellee

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. Mark Shane Beaulieu, Defendant and Appellant.	)	Supreme Court No. 20150345 McKenzie Co. No. 27-2013-CR-01007

I certify that a true and correct copy of the **Brief of Plaintiff-Appellee** was emailed to the following parties via electronic mail on the 23rd of March, 2016:

North Dakota Supreme Court
Clerk of ND Supreme Court
supclerkofcourt@ndcourts.gov

Benjamin Pulkrabek
Attorney for Appellant
pulkrabek@lawyer.com

/s/ Charles B. Neff Jr.
Charles B. Neff Jr. (ND # 06406)
McKenzie County Asst. State's Attorney
201 5th St NW, Ste 550
Watford City, ND 58854
(701) 444-3733
mcsa@co.mckenzie.nd.us