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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JARRED P. RYDER, Defendant and Appellant.	D060138 (Super. Ct. No. SCE309940)

APPEAL from a judgment of the Superior Court of San Diego County, William J. McGrath, Jr., Judge. Affirmed.

A jury convicted Jarred P. Ryder of first degree burglary of an inhabited dwelling (Pen. Code, §§ 459, 460).[1] The court sentenced him to three years' formal probation and ordered him to perform 20 days of community service.

On appeal, Ryder argues the late disclosure of the presence of a second police officer during an interview with Ryder prejudicially violated the reciprocal discovery

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1 All further statutory references are to the Penal Code unless otherwise specified.

statutes (Pen. Code, § 1054 et seq.), his rights to a fair trial and effective assistance of counsel, and his due process rights under the Sixth and Fourteenth Amendments to the United States Constitution. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of March 28, 2011, two men burglarized a converted garage located on property near Ryder's residence. Later that evening, Ryder spoke to the investigating officer, San Diego Deputy Sheriff Phillip Fuhr, about the burglary. Ryder told Fuhr that a friend named "Derek" came to the property earlier that evening with two other men. Derek had called Ryder earlier in the evening and told Ryder he wanted to rob the converted garage. Ryder told him not to do it, but Derek came over anyway. Ryder stood by Derek's van and saw Derek go behind the garage with one of the other men, remove the window from the back of the garage, and drop it to the ground, causing it to break. Ryder saw Derek and the other man make at least two trips from the garage to the van, carrying various items. During these events, Ryder stayed by the van. He told Fuhr he was the "lookout" for the burglary.

Another deputy, Cliff LaPlante, was at the scene as a cover officer and heard Ryder's statement to Fuhr that he was the "lookout." However, Ryder's trial counsel and the prosecutor did not know about LaPlante's presence during Ryder's interview with Fuhr until Fuhr identified him as the interview cover officer in the course of redirect examination at trial. LaPlante's name is not mentioned in any of the police reports written by Fuhr and provided to defense counsel by the prosecutor. LaPlante did not write any reports related to the incident.

Ryder's trial counsel sent pretrial discovery to the prosecution, asking for all statements attributed to Ryder, a list of "all persons present during which such statement[s] [were] made," and the names of "each law enforcement officer and agency who was present during any questioning of [Ryder]." Ryder's trial counsel did not receive a response to these requests and prepared for trial under the assumption that no one other than Fuhr was present at the time Ryder admitted to being the lookout.

After Fuhr testified regarding LaPlante's presence during Ryder's interview, Ryder's trial counsel argued LaPlante should not be allowed to testify and moved for a mistrial based on the late disclosure of LaPlante. He argued he would have advised his client to accept a plea offer to felony grand theft made by the prosecutor before the start of trial had Ryder's counsel known LaPlante was a witness. That knowledge would have affected his trial strategy, and he would not have considered calling Ryder to testify.

The prosecutor agreed not to present LaPlante as a witness in the People's case-in-chief. However, were Ryder to testify, the prosecution would call LaPlante as a rebuttal witness. The prosecutor also noted that were LaPlante's presence known earlier, the State would not have made a plea offer to Ryder the day before because LaPlante's presence strengthens the prosecution's case.

The trial court denied the mistrial motion, concluding no irreparable damage had been done to Ryder's case and the jury has not been prejudiced. The court would not allow the prosecution to reopen its case-in-chief to call LaPlante. If Ryder testified, however, the court ruled the prosecution could call LaPlante as a rebuttal witness and it would give a limiting instruction to the jury regarding late discovery. Ryder's counsel

decided not to call Ryder to testify and the defense rested without presenting any evidence.

DISCUSSION

Ryder argues the court's ruling on the late discovery of LaPlante's presence during Fuhr's interview with Ryder was a prejudicial violation of the reciprocal discovery statute (§ 1054.1), and the late discovery violated his constitutional rights.

I

The reciprocal discovery statute requires the prosecutor to disclose to the defendant certain categories of evidence in the possession of the prosecuting attorney or known to be in the possession of any investigating agencies. (§ 1054.1.) The prosecuting attorney shall disclose "[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial." (§ 1054.1, subd. (a).) These disclosures shall be made at least 30 days prior to the trial, but "[i]f the material and information becomes known to . . . a party within 30 days of trial, disclosure shall be made immediately . . . ." (§ 1054.7.)

Before a defendant may seek court enforcement of any of the disclosures required under section 1054.1, the defendant must make an informal request of the prosecutor for the desired material and information. (§ 1054.5, subd. (b).) On a showing the prosecuting attorney has not complied with section 1054.1 and the defendant has made an informal request for the desired material, "a court may make any order necessary to enforce [the statute], including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b).)

The court may also advise the jury of any untimely disclosures. (*Ibid.*) However, a court may only prohibit the testimony of a witness if all other sanctions have been exhausted and it may only dismiss a charge if required to do so by the United States Constitution. (§ 1054.5, subd. (c).)

A violation of section 1054.1 is subject to the harmless error standard established in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Verdugo* (2010) 50 Cal.4th 263, 280.) Under this standard, a defendant must demonstrate the error resulted in prejudice. (*Watson*, at p. 834.) A reversal is required if the evidence indicates it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id.* at p. 836.)

If late discovery implicates a defendant's constitutional rights, a reviewing court evaluates whether the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Gonzalez* (2006) 38 Cal.4th 932, 961.) Under the *Chapman* standard, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

II

Ryder claims the People prejudicially violated the reciprocal discovery statute when LaPlante's presence during Ryder's interview was not disclosed until trial. Although the People admit a witness was disclosed late in the case, they do not concede section 1054.1 was violated. The trial court acknowledges the prosecutor has an

obligation to respond to an informal discovery letter in some fashion, for example, by calling the main officer and asking if anyone else was present at the time the defendant was questioned. However, the trial court made no ruling about whether the prosecutor's conduct violated section 1054.1 and we also decline to reach any conclusion on this point.

Assuming arguendo that the reciprocal discovery statute was violated, we conclude it did not result in prejudice to Ryder under *Watson*. Ryder has not proven it is reasonably probable that a result more favorable to him would have resulted had he known about LaPlante's presence earlier in the case. All the evidence points to the conclusion that the result would have been *less* favorable to Ryder if LaPlante's presence was known earlier. For example, Ryder would not have received a plea offer and the prosecution would have called both Fuhr and LaPlante to testify that Ryder made an incriminating statement. We conclude any error regarding the late discovery of LaPlante was harmless under the *Watson* standard. We also conclude the trial court did not abuse its discretion when it restricted the prosecution from calling LaPlante in its case-in-chief and offered a limiting instruction were LaPlante to testify in rebuttal.[2] (See *People v. Ayala* (2000) 23 Cal.4th 225, 299.)

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[2] We also note that the trial court's ruling, if viewed as a sanction for violating section 1054.1, provided a greater sanction than authorized by the statute. Section 1054.5, subdivision (c), specifically provides that the court "may prohibit the testimony of a witness . . . *only if all other sanctions have been exhausted*." (Italics added.)

Ryder also asserts the late discovery implicated his constitutional rights and, under the *Chapman* standard, the prosecution must prove this error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) As discussed above, were LaPlante's presence known to the parties sooner, the outcome would have been *worse* for Ryder. He would have had no other offer from the prosecution except to plead guilty to the charged count, and would have prepared for a trial against two witnesses to his incriminating statements rather than one. We conclude any prejudice to Ryder from the late discovery was harmless beyond a reasonable doubt.

The late discovery of LaPlante certainly presented Ryder's counsel with an unwelcome surprise in the middle of trial, which California's discovery statutes generally seek to avoid. We agree that incomplete or delayed responses to specific discovery requests put the defense in a difficult position and might cause it to " 'abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.' " (*In re Brown* (1998) 17 Cal.4th 873, 887.) As Ryder recognized in his briefing, on review we consider whether the prosecutor's failure to respond had any *adverse effect* on the presentation of defendant's case. (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 53.) As discussed above, we do not agree that Ryder was harmed by the late discovery.[3] Any argument that defense counsel would have advised

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[3] We also note that *Brown* and *Meraz* examine instances of late discovery of potentially *exculpatory* evidence under *Brady*. We discuss any potential *Brady* violations claimed by Ryder separately in Part III, as the prosecution's *Brady* obligations are separate from any violation of the reciprocal discovery statutes.

Ryder differently or changed its trial strategy is speculative. Generalized, speculative claims that counsel would or could have either advised his or her client differently or adjusted the defense theory of the case are insufficient to support a claim of prejudicial error. (See *People v. Verdugo, supra,* 50 Cal.4th at pp. 281-282.) We conclude Ryder has not demonstrated prejudice under either the *Watson* or *Chapman* standards.

III

Although Ryder does not directly assert the prosecution committed a *Brady*[4] violation when the parties discovered LaPlante's presence at the time Ryder made inculpatory statements, the People address this issue in their brief to respond to Ryder's constitutional claims.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland*, *supra*, 373 U.S. at p. 87.) This duty to disclose evidence applies even when there has been no request by the accused (*U.S. v. Agurs* (1976) 427 U.S. 97, 107), and includes impeachment evidence as well as exculpatory evidence (*U.S. v. Bagley* (1985) 473 U.S. 667, 676).

" 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or

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4 *Brady v. Maryland* (1963) 373 U.S. 83.

inadvertently; and prejudice must have ensued.' " (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043, quoting *Strickler v. Greene* (1999) 527 U.S. 263, 281-282.) We review de novo whether a defendant established the elements of a *Brady* claim. (*Salazar*, at p. 1042.)

We conclude no *Brady* violation occurred here. Although the fact of LaPlante's testimony was likely inadvertently suppressed by the prosecution, his testimony would have corroborated that of Fuhr, providing further inculpatory evidence that Ryder admitted to being a lookout on the night of the burglary. The suppressed evidence is not favorable to the defense and does not fall within the scope of *Brady* constitutional violations.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.