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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1848-22**

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

D.A.B.,

Defendant-Respondent.

Submitted September 11, 2023 – Decided September 19, 2023

Before Judges Sabatino and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 22-03-0164.

Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney for appellant (Sarah A. Spanarkel, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the briefs).

Rosenberg, Perry & Associates, LLC, attorneys for respondent (Robert M. Perry, on the brief).

PER CURIAM

The State appeals the trial court's February 8, 2023 order dismissing this prosecution with prejudice. The dismissal was ordered as a sanction for what the trial court determined was the State's "purposeful" misleading conduct in withholding from defense counsel that the alleged victim had notified the State through her attorney in writing that she would not testify against defendant if she were subpoenaed to testify at his trial.

For reasons that follow, we affirm the court's ruling. The record amply supports the court's determination that the State misled defense counsel about the victim's willingness to testify. Additionally, the trial court did not abuse its discretion in ordering dismissal as a sanction for the State's purposeful violation of Brady v. Maryland, 373 U.S. 83 (1963), in failing to disclose potentially exculpatory material information.

I.

The pertinent facts and procedural history are derived from the State's appellate brief and are largely undisputed.

On July 8, 2021, Washington Township Police Officer Kyle Fisler met with the alleged victim, A.B.,¹ at the entrance to the township police department.

¹ We use initials for the names of the alleged victim and defendant to protect the victim's privacy. R. 1:38-3(c) (6), (12).

A.B. reported that her then husband, defendant D.A.B., had strangled her the previous night. She wanted to get more information about filing an incident report. Another officer also arrived.

The officers and A.B. relocated to a private room. A.B. asked twice what would happen if an incident report were filed, inquiring specifically whether defendant would be notified about her police statement. A.B. stated that she did not want to press charges, have defendant arrested, or file for a restraining order. Instead, she wished to document the incident "if she needed to proceed in the future." She expressed concern that a complaint would be sent to defendant through the mail because she and defendant were living together at the time.

A.B. ultimately provided the police with a written statement, a copy of which is not in the appellate record.² At oral argument before the trial court, the assistant prosecutor represented that the interview with A.B. was recorded on police body-worn cameras.³

According to the State's brief, A.B. described to the police an argument she had with the defendant the previous night. She reported that defendant had

² We cannot tell whether the trial court was furnished with the report.

³ Those videos are not in the appellate record, and the trial court made no mention of viewing them.

pinned her down on the bed and choked her three times. She further alleged that defendant "banged her head on the door and threw her to the ground." She said that she couldn't breathe and "could not stop coughing and throwing up after the incident." Officer Fisler photographed A.B.'s neck and observed minor injuries.⁴ Apparently, there were no eyewitnesses to the altercation.

Based on A.B.'s allegations and her apparent injury, Officer Fisler issued a summons charge against defendant that same day charging him with third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(13), and the disorderly persons offense of simple assault, N.J.S.A. 2C:12-1(a)(1). Thereafter, defendant was charged by a grand jury under an indictment charging him with third-degree aggravated assault. Defendant was arraigned and entered a not-guilty plea.

From April to October 2022, plea negotiations occurred. Meanwhile, defendant and A.B. finalized their divorce, and as of 2023 they were no longer residing together.

On October 31, 2022, an assistant prosecutor emailed defense counsel a revision of the State's previously extended plea offer. As described in

⁴ The photographs are not in the appellate record. In his brief, defendant disputes whether there was, in fact, any injury depicted in the photographs.

defendant's brief, the offer was "less punitive than that previously extended."

The following email exchanges ensued that afternoon:

[Defense Counsel (at 12:13 p.m.)] I will relay the offer. Do you have any additional discovery to provide, including any statements and/or communication with the alleged victim?

[Assistant Prosecutor (at 12:19 p.m.)] No[,] we do not have any new discovery to provide.

[Defense Counsel (at 12:59 p.m.)] Not to belabor the point, but have you received or engaged in any communication with the alleged victim?

[Assistant Prosecutor (at 3:23 p.m.)] We have not had any further communications since the last time we discussed this case at arraignment.

[Defense Counsel at (4:11 p.m.)] I'm confused . . . My understanding^[5] is that she [A.B.] retained [an attorney] and that he has sent you correspondence. Is that accurate?

[(Emphasis added)]

The assistant prosecutor did not respond by email to defense counsel's 4:11 p.m. email. Instead, immediately following receipt of the email, the assistant prosecutor called defense counsel and told him that: (1) the State did

⁵ Defense counsel's query suggests he was aware of such correspondence from A.B.'s attorney, but defendant asserts that, as of the time of briefing on this appeal, he has not seen the letter.

possess a letter from A.B.'s attorney, which had been received at some point after the arraignment; (2) the letter asserted that A.B. "will decline to cooperate in any prosecution of defendant;" and (3) the letter further stated that A.B. "will assert her Fifth Amendment Privilege if called upon to testify in defendant's criminal trial." According to the assistant prosecutor, she "told to defense counsel that she did not believe the actual physical correspondence was exculpatory or Brady material, therefore, it did not need to be turned over to counsel."⁶

Defendant thereafter moved to dismiss the indictment "for prosecutorial misconduct and/or willful violation of the State's discovery obligations." The State filed written opposition.

After hearing oral argument, the trial court dismissed the indictment with prejudice. The court explained its decision in an oral opinion and memorialized it in a written order the same day.

With respect to defendant's allegation of a Brady violation, the court reasoned:

⁶ The letter from A.B.'s attorney apparently was not provided to the trial court and is not included in the appellate record. It is not clear what, if any, wrongful conduct A.B. was concerned about that prompted her to invoke her constitutional privilege.

This was a counseled representation from the victim that she wished to assert her rights under the Fifth Amendment of the Constitution. Whether it is pertinent to Defendant's case is not for the State's analysis. It is for the Defense to determine, once they have received that discovery, whether it is relevant to the case that they are representing the Defendant on . . . Asserting the Fifth Amendment means it is -- she is withdrawing the information. That does -- That essentially hinders the ability of the State to be able to present proofs [at trial] of what happened.

The court further observed that, without A.B.'s testimony, her previous statements to law enforcement inculcating defendant would be inadmissible hearsay. The court remarked, "I don't understand why the State would continue to withhold that information from the Defense, so that they can make their adjustments to how they're going to proceed in their case. It's clearly a Brady violation."

Next, in considering, the appropriate remedy for the violation, the court expressly found the State's conduct "purposeful." The Court noted:

Not only was it misleading to say, well, yeah, she [A.B.] said all along she didn't want to prosecute . . . [I]t is the obligation of the attorney[s] that represent the State of New Jersey to analyze what they have and to give it to the other side so they can analyze it and decide how to proceed . . . You cannot do that. You cannot withhold information from a Defendant that the victim is going to assert their Fifth Amendment privilege at trial and not testify against him. I'm going to grant

[defendant's motion] and dismiss the case . . . And I will say that because, it's dismissed with prejudice.

[(Emphasis added)]

The court stayed the matter for forty-five days, a period which has since expired. The State's present appeal followed.

II.

Several fundamental principles guide our discussion. "As codified in Rule 3:13-3, our state has a tradition of what is often described as an "open file" model of reciprocal pretrial criminal discovery." State v. Ramirez, 252 N.J. 277, 295 (2022). The objective of our reciprocal discovery rules in criminal cases is "to prevent surprise, eliminate gamesmanship, and afford a party an opportunity to obtain evidence and research law in anticipation of evidence and testimony which an adversary will produce at trial." State v. DiTolvo, 273 N.J. Super. 111, 115 (Law Div. 1994) (citing State v. Williams, 80 N.J. 472, 482 n.2 (1979) (Schreiber, J., dissenting)).

Under Rule 3:13-3(a) and (b)(1), "[o]nce an indictment has issued, a defendant has a right to automatic and broad discovery of the evidence the State has gathered in support of its charges." Ramirez, 252 N.J. at 295-96 (quoting State v. Scoles, 214 N.J. 236, 252 (2013) (citing R. 3:13-3)). "The onus is on

the State' to make the discovery available to the defendant." Id. at 296 (quoting Scoles, 214 N.J. at 253).

The discovery rules provide defendants an opportunity to learn "the extent of the State's case against [that defendant.]" State v. Kearny, 109 N.J. Super. 502, 506 (Law. Div. 1970) (citations omitted); see also State v. Tate, 47 N.J. 352, 354-57 (1966). Discovery must be turned over by the State so that defense counsel "may intelligently advise as to the defense and properly prepare for trial." State v. Cook, 43 N.J. 560, 569 (1965).

A "defendant's right to discovery is not dependent upon an appraisal of the beneficial value of the material sought to be discovered." State v. Polito, 146 N.J. Super. 552, 556 (App. Div. 1977) (citing State v. Braeunig, 122 N.J. Super. 319, 332 (App. Div. 1973)). Nor is the defendant obligated to "badger compliance." State v. Hunt, 184 N.J. Super. 304, 310 (Law Div. 1981).

Rule 3:13-3(b)(1) "codifies the standards set forth decades ago by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972)." State v. Higgs, 253 N.J. 333, 355 (2023).

In Brady, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates [constitutional

principles of] due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In Giglio, the Supreme Court extended Brady's scope to include evidence that could be used to impeach government witnesses. 405 U.S. at 153-54.

Courts consider "[t]hree essential elements" in assessing whether a Brady violation has occurred: "(1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and (3) the evidence must be material to the defendant's case." Higgs, 253 N.J. at 355 (2023) (quoting State v. Brown, 236 N.J. 497, 518 (2019)).

As to that third element of materiality of evidence the State did not timely disclose to defense counsel before trial, "'we examine the circumstances under which the nondisclosure arose' and '[t]he significance of a nondisclosure in the context of the entire record.'" Brown, 236 N.J. at 518-19 (quoting State v. Marshall, 123 N.J. 1, 199-200 (1991)). "[W]e consider the strength of the State's case, the timing of disclosure of the withheld evidence, the relevance of the suppressed evidence, and the withheld evidence's admissibility." Ibid. The significance of the nondisclosure "depends primarily on the importance of the

[evidence] and the strength of the State's case against [a] defendant as a whole." Marshall, 123 N.J. at 200.

Here, the undisputed facts demonstrate that the State received a letter from its only fact witness, through her counsel, announcing her intention to assert her Fifth Amendment privilege if she were called to testify. The State withheld both the contents of that letter and its very existence from defendant during a critical stage of the criminal justice process, plea negotiations. The State extended a reduced plea offer without disclosing this communication that impeached the State's sole witness. Even worse, when specifically questioned by defense counsel's email about any communication between the State and A.B., initially the State misleadingly denied receipt of any such communication. It was only when specifically questioned about such a letter by defense counsel that the State conceded its existence.

The trial judge correctly found that the State's conduct here violated the fundamental principles of our rules of discovery. Defendant had a right to "automatic and broad discovery of the evidence" in the State's possession. Ramirez, 252 N.J. at 295-96 (quoting Scoles, 214 N.J. at 252 (citing R. 3:13-3)). That right of disclosure included the letter from A.B.'s counsel. It is irrelevant that the communication to the prosecutor's office came from A.B.'s attorney

rather than from A.B., herself. The attorney was acting as A.B.'s agent. Jennings v. Reed, 381 N.J. Super 217, 231 (App. Div. 2005).

The State's conduct also violated the principles of Brady. The letter was "favorable to the accused, either as exculpatory or impeachment evidence[.]" Higgs, 253 N.J. at 355 (quoting Brown, 236 N.J. at 518). The letter concerned the non-availability and non-cooperation of the sole witness to the alleged criminal act. If A.B. did not testify at trial, then the State would likely be unable to introduce her earlier statement to the police into evidence, due to both hearsay restrictions and the Confrontation Clause. See State v. Williams, 182 N.J. Super. 427, 431-37 (App. Div. 1982) (holding that a prior signed statement by a witness could not be admitted as a prior inconsistent statement where the witness refused to testify and therefore could not be cross-examined) (citing Douglas v. Alabama, 380 U.S. 415 (1965)).

The State has not identified any hearsay exception that would have made A.B.'s statement accusing defendant of an assault admissible if she declined to testify. If such a hearsay exception applied, the written statement may well have been weaker proof before the jury than the victim's in-court testimony. Alternatively, if A.B. did eventually testify, the defense would surely have wanted to use her letter to impeach her credibility.

The letter is clearly material. Its existence would certainly affect defendant's decision about whether to go to trial. The letter made clear that, should the case proceed to trial, the State potentially would have virtually no evidence with which to satisfy its burden of proof. Defendant's strategy, both at trial and during pretrial plea negotiations, would undoubtedly be materially altered by the victim's unwillingness to testify.

The timing of the State's eventual admission of the existence of the letter was also highly problematic. It could reasonably support an inference that the State made a strategic decision to elicit defendant's acceptance of a plea offer before defendant's attorney learned of the victim's correspondence.

For these many reasons, the trial court correctly determined that the State's conduct here amounted to a violation of both discovery principles and the Brady doctrine.

As to the question of remedy, the State argues that "dismissal of the indictment was not warranted as it was not a willful or outrageous act by the State." The State contends that the proper remedy would have been for the trial court to review the letter in-camera to determine if it was discoverable. In response, defendant argues that dismissal of the indictment was the only adequate remedy in this case, and that it was necessary to deter similar future

misconduct by the State. Defendant further asserts the remedy does not offend the interests of justice, because "this is the exact outcome the alleged victim has sought from the inception of this case."

As the Supreme Court recently reaffirmed, "[a] decision to dismiss an indictment is generally left to the sound discretion of the trial court and is reviewed only for abuse of discretion." State v. Zadroga, ___ N.J. ___, ___ (2023) (slip op. at 19) (citing State v. Twiggs, 233 N.J. 513, 544 (2018)). The trial court's discretion "must be informed and guided by considerations of fundamental fairness, as well as the judiciary's responsibility for the proper overall administration of the criminal justice system." State v. Abbati, 99 N.J. 418, 429 (1985). Applying that deferential scope of review here, we sustain the trial court's order of dismissal.

Our discovery rules provide the trial court with a range of remedies for non-compliance. The court may "order such party to permit the discovery of materials not previously disclosed, grant a continuance or delay during trial, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate." R. 3:13-3(f) (emphasis added). Those available sanctions include dismissal with prejudice, a sanction which a party invites "by deliberately pursuing a course that thwarts persistent

efforts to obtain the necessary facts." Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 515 (1995).

Moreover, "a trial court must dismiss an indictment if prosecution would violate the defendant's constitutional rights." Abbati, 99 N.J. at 425. "[I]n the context of a Brady violation, the remedy of dismissal of an indictment with prejudice is utilized when 'the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" Brown, 236 N.J. at 528 (quoting United States v. Russell, 411 U.S. 423, 431-32 (1973)).

We are satisfied the trial court's chosen remedy -- dismissal of the indictment with prejudice -- was not an abuse of discretion for multiple reasons.

First, the remedy was plainly within the court's authority to impose, under both the rules of discovery and the Brady doctrine. See R. 3:13-3(f); Abbati, 99 N.J. at 425; Brown, 236 N.J. at 528 (quoting Russell, 411 U.S. at 431-32).

Second, as the trial court found, the State's misconduct was "purposeful" and "misleading." The State knowingly withheld discoverable evidence that would materially affect defendant's pretrial preparation and position in plea negotiations. The record supports the court's perception that the State withheld the information about the victim's unwillingness to testify intentionally, and not

inadvertently. The trial court's findings bespeak an "intention inconsistent with fair play and therefore inconsistent with due process[.]" State v. Laganella, 144 N.J. Super. 268, 282 (App. Div. 1976). The State's deliberate conduct was sufficiently extreme to justify dismissal of the indictment. See Brown, 236 N.J. at 528.

Lastly, we emphasize that prosecutors hold a high position of responsibility and trust in our criminal justice system. RPC 3.8(d), entitled Special Responsibilities of a Prosecutor, instructs that a prosecutor shall:

make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

This Rule is well grounded in our criminal jurisprudence. Prosecutors have a fundamental duty to see that "justice is done[.]" not merely to obtain convictions. State v. Williams, 244 N.J. 592, 607 (2021) (quoting State v. Frost, 158 N.J. 76, 83 (1999) (citations omitted)).

When, as here, the State fails to adhere to the Rules of Court, in a manner that can give it an unfair advantage in plea negotiations, the integrity of the criminal justice system is compromised. The improper conduct exhibited in this case justifies a strong judicial sanction, which the trial court appropriately

imposed. We anticipate the sanction will deter others from engaging in similar conduct in the future. There is no need to remand to develop the record in more detail or for further proceedings.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION