SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3979-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

N.M.,

Defendant-Appellant.

Submitted February 28, 2023 – Decided April 26, 2023

Before Judges Messano, Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment Nos. 17-06-0353 and 19-05-0562.

Joseph E. Krakora, Public Defender, attorney for appellant (Rochelle Watson, Deputy Public Defender II, of counsel and on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Colleen Kristan Signorelli, Assistant Prosecutor, on the brief).

PER CURIAM

In November 2016, M.B. was shot and killed while standing on a sidewalk in Jersey City.[1] Defendant, N.M., who was sixteen years old at the time of the shooting, pled guilty to the first-degree aggravated manslaughter of M.B., N.J.S.A. 2C:11-4(a)(1). He was sentenced to ten years in prison, with periods of parole ineligibility and supervision as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant appeals from his conviction, contending (1) the prosecutor abused her discretion in waiving the charges against him to adult criminal court; and (2) the trial court erred in failing to hold an evidentiary hearing and in denying defendant's motion to dismiss the indictment with prejudice based on a Brady violation. See Brady v. Maryland, 373 U.S. 83 (1963). Discerning no abuse of discretion or error of law in the waiver decision or the denial of the motion to dismiss, we reject defendant's arguments and affirm.

I.

At approximately 9:15 p.m. on November 3, 2016, M.B. was shot multiple times and, shortly thereafter, was pronounced dead. The police obtained

[1] We use initials for the victim to protect his family's privacy interests. We also use initials for witnesses to protect their privacy interests. Finally, we use initials for defendant to protect the confidentiality of the juvenile proceedings. See R. 1:38-3(d)(5).

surveillance videos from two buildings near the shooting. The video from one of the buildings showed a silver Volvo drive up and park near where M.B. was standing minutes before the shooting. Three men exited the Volvo, two of the men walked towards M.B., and the other man walked in another direction.

The videos from the other building do not show M.B., but show two men walk towards M.B., extend their arms, and fire handguns in the direction of where M.B. was later found after the shooting. The two men then turn and run in the opposite direction.

The day after the shooting, police officers observed a Volvo matching the car depicted in the surveillance video. The officers stopped the vehicle and brought the driver, S.B., in for questioning. S.B. acknowledged that the Volvo seen in the video was his car. Ultimately, he identified defendant and Khalil Holmes as two of the men he had dropped off just before the shooting.[2]

Shortly after the shooting, detectives interviewed and obtained statements from two men — I.M. and T.D. — who had witnessed the shooting. I.M. identified Holmes as one of the shooters but did not identify the other shooter.

[2] S.B. initially identified Holmes as "Ka," and further investigation established that Ka was Holmes. S.B. was Facebook friends with "Ka Marion," an account with photos of Holmes.

T.D. stated that both shooters were wearing masks, and he did not identify either shooter.

Several days after the shooting, defendant's father, C.M., contacted the prosecutor's office after he had overheard defendant talk about the shooting. Detectives showed C.M. the surveillance videos, and C.M. identified defendant as one of the persons depicted in the videos, including one of the persons firing a handgun.

Defendant and Holmes were both charged with the murder of M.B., as well as related offenses. Holmes was twenty years old at the time of the shooting and was charged as an adult. The prosecutor moved to waive the charges against defendant and transfer them to the Law Division so that he could be prosecuted as an adult. After a hearing, the Family Part granted that motion.

Thereafter, defendant and Holmes moved to suppress the identifications made by S.B., I.M., and C.M. Following a multi-day evidentiary hearing, the trial court denied that motion. Defendant's trial was then scheduled to begin on January 28, 2019.

On January 14, 2019, the State produced a transcript of the statement given by T.D. in November 2016. The State also listed T.D. as one of the witnesses it intended to call at trial. Defense counsel immediately advised the

State that the defense team had not previously been informed that T.D. had been an eyewitness of the shooting and had not been given a copy of T.D.'s statement.

Contending that the State's belated disclosure of T.D.'s statement constituted a Brady violation, defendant moved to dismiss the indictment with prejudice as a sanction for the violation. Defendant also requested a new juvenile waiver hearing, pointing out that T.D.'s statement had not been considered at the waiver hearing.

In opposition to defendant's motion, and at the direction of the trial court, the State submitted four certifications: two from Detective Erick Infantes; one from the assistant prosecutor handling the case, David Feldman; and one from Assistant Prosecutor Leonardo Hernandez, who was the chief of the homicide division.

Infantes certified that he had interviewed T.D. on November 4, 2016, but had forgotten to complete a report documenting that interview. Infantes also had failed to download and save to the relevant file the video recording of the T.D. interview.

Approximately a year later, in November 2017, a supervisor advised Infantes that the recording of the T.D. interview had not been downloaded and no report of the interview had been prepared. On November 28, 2017, Infantes

prepared a report of the T.D. interview and saved it and the video recording of the interview to the relevant file.

Feldman certified that he had first seen the report of the T.D. interview in November 2018, while preparing for trial. He requested that the recording of the interview be transcribed. According to Feldman, he "had no idea in reviewing the report or requesting the transcript that [T.D.'s statement] and [the] report [of the interview] had been uploaded late. Consequently, it never occurred to [him] that the statement and/or the report [were] omitted from the discovery process."

Feldman also explained that he was not aware T.D.'s statement had not been disclosed to defense counsel until January 14, 2019. As soon as he heard from defense counsel, he reviewed the State's files and confirmed that T.D.'s statement had not previously been produced. He, therefore, informed defense counsel that he would not call T.D. as a witness.

Hernandez certified that he had discussed potential plea agreements with defense counsel in the days immediately before and after the disclosure of T.D.'s statement. According to Hernandez, prior to the disclosure of the statement, defense counsel had represented that defendant and Holmes would each agree to plead guilty to an amended charge of aggravated manslaughter. After the

disclosure of the statement, defense counsel maintained that plea position but expressed some concerns about the timeliness of the disclosure. In response, Hernandez explained the belated disclosure was concerning to him but that "there was nothing to indicate a nefarious intent or bad faith on behalf of anyone involved," and the State would continue to consider the proposed plea agreements. Shortly thereafter, Hernandez notified defense counsel that the plea offers had been authorized, and it was "[his] understanding that the matter would be scheduled for a plea hearing."

In February and March of 2019, the trial court heard several days of arguments on the motion to dismiss the indictment. The trial court found that the State had committed a Brady violation by failing to timely disclose and produce a copy of T.D.'s statement.[3] Initially, the trial court dismissed the indictment without prejudice and reserved on whether the dismissal should be with prejudice. The court then ruled that defendant was entitled to a new juvenile waiver hearing and remanded the matter to the Family Part.

On March 15, 2019, following further argument, the court issued an order denying defendant's motion to dismiss the indictment with prejudice.

[3] Because no party has challenged the trial court's Brady finding on this appeal, we do not address that ruling and accept it for purposes of this appeal.

Explaining its reasons on the record, the court stated that dismissal with prejudice was not warranted because the late disclosure of T.D.'s statement had been made pretrial and any prejudice to defendant could be corrected by requiring a new juvenile waiver hearing and, if needed, further proceedings before trial. The trial court also found that the State's failure to timely disclose T.D.'s statement was not intentional or willful, pointing out that the disclosure happened before trial. Finally, the trial court declined to hold an evidentiary hearing on the State's belated disclosure, reasoning that it had already found that the State did not act intentionally or willfully and that the facts did not support a contrary conclusion.

The State filed a new juvenile complaint against defendant and moved to waive those charges to adult court. On March 25, 2019, and April 5, 2019, the family court conducted a new juvenile waiver hearing. The family court found that defendant was old enough to make him subject to waiver and that there was probable cause that he had murdered M.B. The family court also found that the prosecutor had appropriately considered all the statutory factors outlined in the waiver statute, N.J.S.A. 2A:4A-26.1(c)(3), and had not abused her discretion in seeking to waive the charges to the Law Division. Accordingly, the family court granted the State's motion.

In May 2019, a grand jury returned an eight-count indictment against defendant and Holmes charging them with first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:11-3(a)(1) or (2); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1). Six months later, on October 25, 2019, defendant pled guilty to an amended charge of aggravated manslaughter. In the plea agreement, the State agreed to dismiss all other charges and recommend a ten-year prison term subject to NERA. Defendant reserved his right to appeal the orders granting the juvenile waiver and denying his motion to dismiss the indictment with prejudice.

Thereafter, in January 2020, defendant was sentenced in accordance with the plea agreement to ten years in prison subject to NERA. He now appeals from his conviction.[4]

[4] Holmes also pled guilty to an amended charge of aggravated manslaughter. Like defendant, he was sentenced to ten years in prison subject to NERA. He appealed, contending that his sentence was excessive. We rejected that argument and affirmed his sentence. State v. Holmes, No. A-2897-20 (App. Div. Oct. 27, 2021).

II.

On appeal, defendant presents two arguments, which he articulates as follows:

> POINT I – BECAUSE THE PROSECUTOR ABUSED HER DISCRETION IN FAILING TO GIVE ADEQUATE WEIGHT TO THE JUVENILE'S CHILD WELFARE HISTORY, HIS LESSENED DEGREE OF CULPABILITY, AND HIS ELIGIBILITY FOR SPECIAL EDUCATION SERVICES, THE MATTER MUST BE REMANDED FOR A NEW WAIVER HEARING.
>
> POINT II – THE TRIAL COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING TO DETERMINE IF THE STATE'S FAILURE TO TURN OVER EXCULPATORY EVIDENCE WAS THE RESULT OF RECKLESS MISCONDUCT, ESPECIALLY WHERE THE TRIAL COURT FOUND THAT THE INVESTIGATING DETECTIVE'S CERTIFICATIONS RAISED "MORE QUESTIONS THAN [] ANSWERS."

A. The Waiver to Adult Court.

"As our Supreme Court has recognized, 'waiver to the adult court is the single most serious act that the juvenile court can perform . . . because once waiver of jurisdiction occurs, the child loses all the protective and rehabilitative possibilities available to the Family Part.'" State in the Int. of Z.S., 464 N.J. Super. 507, 513 (App. Div. 2020) (quoting State v. R.G.D., 108 N.J. 1, 4-5 (1987)). To be subject to waiver, the juvenile must have been (1) fifteen years

old or older at the time of the alleged act; and (2) charged with at least one of the serious offenses listed in the waiver statute, which includes criminal homicide. N.J.S.A. 2A:4A-26.1(c)(1) and (2).

The decision on whether to seek waiver is committed to the discretion of the prosecutor. State in the Int. of N.H., 226 N.J. 242, 249 (2016) (citing N.J.S.A. 2A:4A-26.1(c)(3)). In seeking waiver, the prosecutor must submit a statement of reasons that sets forth the facts used to assess the factors listed in the statute, together with an explanation of how those factors support waiver. N.J.S.A. 2A:4A-26.1(a); N.H., 226 N.J. at 250. Specifically, the prosecutor must consider the eleven factors listed in the waiver statute:

> (a) The nature and circumstances of the offense charged;
>
> (b) Whether the offense was against a person or property, allocating more weight for crimes against the person;
>
> (c) Degree of the juvenile's culpability;
>
> (d) Age and maturity of the juvenile;
>
> (e) Any classification that the juvenile is eligible for special education to the extent this information is provided to the prosecution by the juvenile or by the court;
>
> (f) Degree of criminal sophistication exhibited by the juvenile;

> (g) Nature and extent of any prior history of delinquency of the juvenile and dispositions imposed for those adjudications;
>
> (h) If the juvenile previously served a custodial disposition in a State juvenile facility operated by the Juvenile Justice Commission, and the response of the juvenile to the programs provided at the facility to the extent this information is provided to the prosecution by the Juvenile Justice Commission;
>
> (i) Current or prior involvement of the juvenile with child welfare agencies;
>
> (j) Evidence of mental health concerns, substance abuse, or emotional instability of the juvenile to the extent this information is provided to the prosecution by the juvenile or by the court; and
>
> (k) If there is an identifiable victim, the input of the victim or victim's family.
>
> [N.J.S.A. 2A:4A-26.1(c)(3).]

The sufficiency of the prosecutor's written assessment is vital and "should apply the factors to the individual juvenile and not simply mirror the statutory language in a cursory fashion." Z.S., 464 N.J. Super. at 533 (quoting N.H., 226 N.J. at 250). The written assessment cannot be "incomplete or superficial." Id. at 534. Instead, the "written [assessment] must reasonably address the content of the defense material and explain why it is flawed, inadequately supported, internally contradictory, or otherwise unpersuasive." Ibid. Nevertheless, the

waiver statement "need not elaborate about minutia," and we have recognized that the ultimate balancing of the eleven factors "may not be amenable to precise articulation." Id. at 535. Moreover, "[n]o one factor . . . may be treated as dispositive," and the decision as to how much weight to accord each statutory factor remains vested in the discretion of the prosecutor. Ibid.

The prosecutor's waiver decision is reviewed under a deferential standard. N.H., 226 N.J. at 251 (citing N.J.S.A. 2A:4A-26.1(c)(3)). The Family Part must "uphold the decision unless it is 'clearly convinced that the prosecutor abused [her or] his discretion in considering' the enumerated statutory factors." Z.S., 464 N.J. Super. at 519-20 (quoting N.J.S.A. 2A:4A-26.1(c)(3)). In that regard, the Family Part may not substitute its judgment for that of the prosecutor. State in the Int. of V.A., 212 N.J. 1, 8 (2012). Instead, the Family Part is to conduct a limited, yet substantive, review to ensure that the prosecutor has made an individualized decision about the juvenile that was neither arbitrary nor abusive of the prosecutor's considerable discretion. Ibid.; see also N.H., 226 N.J. at 255 (explaining that the "prosecutor's decision to seek waiver is subject to review—at the hearing—for abuse of discretion").

"Our standard of review in juvenile waiver cases 'is whether the correct legal standard has been applied, whether inappropriate factors have been

considered, and whether the exercise of discretion constituted a "clear error of judgment" in all of the circumstances.'" State in the Int. of J.F., 446 N.J. Super. 39, 51-52 (App. Div. 2016) (quoting R.G.D., 108 N.J. at 15).

After the first indictment had been dismissed without prejudice, the State filed new charges against defendant and, in March 2019, moved to waive those charges to the Law Division. In support of its motion, the State submitted a written statement of reasons that analyzed in detail each of the eleven statutory factors. In conducting that analysis, the prosecutor evaluated the information provided by defendant, including information concerning defendant's individualized education program, school social and educational assessment reports, a psychiatric evaluation conducted by a doctor in December 2014, and documents from the Division of Child Protection and Permanency concerning defendant and his family. After evaluating each of the statutory factors and the information provided by defendant, the prosecutor concluded that the balance of the factors weighed in favor of waiving the charges against defendant to the Law Division.

The Family Part then conducted a two-day waiver hearing. There was no dispute that defendant was sixteen years old at the time of the shooting of M.B. Moreover, the Family Part found that there was probable cause supporting the

charge of murder. The Family Part also found that the prosecutor had appropriately considered each of the statutory factors and had not abused her discretion in seeking the waiver. Thus, the court granted the waiver motion.

On this appeal, defendant argues that the State abused its discretion because it failed to adequately consider several of the factors outlined in N.J.S.A. 2A:4A-26.1(c)(3). In that regard, defendant challenges the prosecutor's assessment of factors (c), (e), (f), (g), (h), and (i). Defendant also contends that the Family Part's review of the prosecutor's assessment of these factors was flawed because the court suggested that the nature of the offense charged was the most important factor. We are not persuaded by defendant's arguments.

The statement of reasons submitted by the prosecutor was thorough and complete. The prosecutor described the evidence against defendant and the circumstances of the shooting and death of M.B. She then analyzed each of the eleven statutory factors in sufficient detail.

Defendant's primary argument is that the prosecutor failed to appropriately evaluate defendant's poor academic performance, emotional issues, and unstable family circumstances. The prosecutor did not ignore the information provided by defendant. Instead, the prosecutor evaluated that information but ultimately concluded that it did not outweigh other factors

supporting waiver. Like the family court, we discern no abuse of discretion in that determination.

We similarly discern no abuse of discretion in the prosecutor's evaluation of the other statutory factors challenged by defendant. Those factors were adequately addressed in the statement of reasons, and defendant was not "forced to guess" how the prosecutor had evaluated them. Z.S., 464 N.J. Super. at 533. Defendant either disagrees with the conclusions drawn by the prosecutor or the relative weight attributed to each factor, but those disagreements, without more, do not constitute an abuse of discretion. Indeed, "the waiver analysis is not a counting exercise. Some factors can have more importance or probative strength than others." Id. at 542. And the decision as to how much weight to accord each factor is vested in the discretion of the prosecutor.

Defendant further contends that the Family Part misapplied the law in reviewing the prosecutor's assessment because the court suggested that the nature of the charged offense was the most important factor. We reject this argument as a mischaracterization of the Family Part's decision. In rejecting defendant's arguments against waiver, the Family Part stated that defendant's educational background and family background did not excuse the alleged homicide. That statement, however, was made in the context of addressing

various arguments raised by defendant. A complete review of the Family Part's decision demonstrates that the court understood and properly applied the law in its review of the prosecutor's request for waiver. In that regard, the Family Part reviewed the prosecutor's analysis of each of the statutory factors and ultimately found that "all of the factors . . . appropriate for review were considered." In short, the record does not support defendant's arguments challenging the prosecutor's decision to seek waiver and the Family Part order approving the waiver.

B. The Motion to Dismiss with Prejudice.

The State has an affirmative obligation to disclose all evidence potentially favorable to a defendant. See Kyles v. Whitley, 514 U.S. 419, 432 (1995); State v. Hyppolite, 236 N.J. 154, 165 (2018). In Brady, the United States Supreme Court held that the prosecution's "suppression . . . of evidence favorable to an accused . . . 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." 373 U.S. at 87; accord State v. Carter, 91 N.J. 86, 110 (1982). Both exculpatory and impeachment evidence is governed by the Brady rule. United States v. Bagley, 473 U.S. 667, 676 (1985); Hyppolite, 236 N.J. at 165.

Three elements must be established to prove a Brady violation: "(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." State v. Brown, 236 N.J. 497, 518 (2019) (citing State v. Nelson, 155 N.J. 487, 497 (1998)).

There is no set remedy for a Brady violation. See Brown, 236 N.J. at 527-28. Instead, a Brady violation constitutes an abuse of the discovery process, and the remedy should be designed to protect the defendant's due process rights. Ibid.; see also State v. Scherzer, 301 N.J. Super. 363, 432 (App. Div. 1997) (noting the trial court "properly handled" each of the alleged Brady violations and "fashioned remedies sufficient to ensure that defendant's due process rights were not contravened"). Consequently, like other discovery violations, a Brady violation can be addressed by a range of remedies, which include excluding certain evidence, precluding witnesses from testifying, or ordering a new trial. See, e.g., United States v. Struckman, 611 F.3d 560, 570-71 (9th Cir. 2010); Gov't of V.I. v. Fahie, 419 F.3d 249, 252-54 (3d Cir. 2005). In most situations, the remedy for a Brady violation is a new trial because the violation usually comes to light at or after trial. See Brown, 236 N.J. at 520.

In Brown, the Court discussed dismissal of an indictment with prejudice as a potential remedy for a Brady violation. Id. at 528. The Court, however, did not impose that remedy. Ibid. Nor did the Court set forth the standard for determining whether an indictment should be dismissed with prejudice for a Brady violation. Ibid. Instead, the Court noted that in Brown there was no evidence that the State had willfully or intentionally withheld the discovery from the defense. Ibid.

Accordingly, we must address what standard should be used to determine if a Brady violation warrants dismissal of the indictment with prejudice. Several federal courts have suggested that dismissal with prejudice "may be appropriate in cases of deliberate misconduct." Fahie, 419 F.3d at 254; see also United States v. Lewis, 368 F.3d 1102, 1107 (9th Cir. 2004). Federal courts have also recognized that dismissal of an indictment with prejudice is an extreme remedy that is only warranted where the "prejudice of a Brady violation has removed all possibility that the defendant could receive a new trial that is fair" and dismissal must be employed because "no other remedy would cure [the] prejudice against a defendant." United States v. Pasha, 797 F.3d 1122, 1139 (D.C. Cir. 2015).

Ultimately, "the decision whether to dismiss an indictment lies within the discretion of the trial court." State v. Hogan, 144 N.J. 216, 229 (1996); see also

Brown, 236 N.J. at 521 (applying an abuse of discretion standard to the trial court's evidentiary ruling following a Brady violation). The purpose of the Brady rule "is not to punish society for a prosecutor's conduct but to avoid an unfair trial of an accused." Hyppolite, 236 N.J. at 168 (quoting State v. Vigliano, 50 N.J. 51, 61 (1967)). Consequently, at a minimum, before an indictment is dismissed with prejudice, there needs to be a showing that the State had acted intentionally or willfully in withholding the evidence and defendant was prejudiced in a way that precludes him or her from receiving a fair trial. The key consideration in fashioning a remedy for a Brady violation is whether the discovery violation can be cured to ensure that defendant has a fair trial.

On this appeal, defendant disagrees with the remedy fashioned by the trial court for the Brady violation and contends the court should have conducted an evidentiary hearing prior to ruling on his motion to dismiss the indictment with prejudice. We are not persuaded by defendant's arguments.

The State produced T.D.'s statement before trial. Although the trial court found that belated disclosure was a Brady violation, the court also fashioned a remedy that ensured defendant would receive a fair trial. T.D.'s statement was material in that it might have been used to undermine the identification made by other witnesses because T.D. had stated that the two shooters were masked. If

a fact-finder accepted T.D.'s claim that the shooters were masked, the fact-finder could have also rejected the identifications made by the other witnesses because it is difficult to identify masked persons. By dismissing the charges against defendant without prejudice and requiring a new waiver hearing, the trial court ensured that defendant had that T.D. statement available for the waiver hearing. The information was also available before defendant faced trial, and defense counsel had adequate time to conduct additional discovery concerning T.D.'s statement before trial. Ultimately, defendant chose to plead guilty to an amended charge of aggravated manslaughter.

Nevertheless, defendant contends the trial court should have held an evidentiary hearing before ruling on his motion to dismiss the indictment with prejudice so that the court could have better understood whether the belated disclosure of T.D.'s statement was the result of misconduct. Defendant does not cite, nor are we aware of, any caselaw requiring a trial court to hold an evidentiary hearing prior to fashioning an appropriate remedy for a Brady violation. Moreover, the trial court found the State had not acted intentionally or willfully in failing to timely disclose T.D.'s statement. In making that determination, the court reviewed the certifications that had been submitted by the State and examined how and when T.D.'s statement had been disclosed.

Although defendant points out that the court remarked Infantes's certification raised "more questions than answers," the court made that statement regarding the first certification submitted by Infantes, and Infantes later submitted a supplemental certification.

In short, there is nothing in the record that shows that defendant was precluded from having a fair trial or supports the conclusion that defendant was prejudiced by the belated production of T.D.'s statement. Accordingly, we discern no error of law or abuse of discretion in the trial court's rulings concerning the appropriate remedy for the Brady violation.

Affirmed.