

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0403

STATE OF LOUISIANA

VERSUS

MURRAY SMITH

Judgment Rendered: September 14, 2007

**Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 04-05-0518**

Honorable Todd Hernandez, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

WHIPPLE, J.

The defendant, Murray Smith, was charged by bill of information with obscenity, a violation of LSA-R.S. 14:106. He pled not guilty. A preliminary examination was held wherein the investigating officer, who also witnessed the commission of the offense, testified regarding his observations. The trial court found sufficient probable cause for the charge of obscenity. The defendant waived his right to a trial by jury. During a bench trial, the court agreed to take judicial notice of the evidence adduced at the preliminary examination. At the conclusion of the trial, the defendant was found guilty as charged. The defendant was sentenced to imprisonment in the parish jail for one year. The defendant now appeals asserting two assignments of error as follows:

1. The trial court erred when it convicted the defendant because the state relied on video-surveillance evidence, but the prosecution failed to produce and/or turn over exculpatory evidence to defense counsel in violation of the defendant's Brady and due-process rights.
2. The trial court erred when it convicted the defendant of obscenity because the crime of obscenity requires intentional exposure of certain enumerated body parts and the defendant did not intentionally expose any such body parts.

We affirm the conviction and sentence.

FACTS

The record reflects that on June 19, 2004 the defendant, as he often did, visited the Louisiana State Capitol Park. The defendant claimed he enjoyed making jewelry while sitting outside at the park. Officers with the Department of Public Safety ("D.P.S.") had observed the defendant in the area on numerous prior occasions, without any incident. On this particular day, however, D.P.S. Sergeant Chris Holmes observed the defendant's activity in the park and found his conduct to be suspicious. Although the defendant had been wearing long pants when he arrived at the park, he was later seen wearing shorts. Sgt. Holmes, Sgt. Thomas

Wild and another officer decided to observe the defendant on the video surveillance cameras set up around the perimeter of the park. According to Sgts. Holmes and Wild, the defendant was observed opening his knees, reaching into his crotch area, and exposing his genitals each time a car passed by. After a while, the officers decided to approach the defendant while he was still seated. The angle from which the officers approached prevented the defendant from seeing them until they were very close to him. As the officers stepped in front of the defendant, they both observed his exposed, non-erect, penis. Thus, defendant was charged with obscenity. Sgt. Wild testified at the preliminary examination. Sgt. Holmes was called as a rebuttal witness at the trial.

The defendant testified on his own behalf at the trial. He denied intentionally exposing his genitals. He claimed he was innocently in the park making jewelry. He claimed he was wearing black shorts with a black tray positioned on his lap, and thus, the officers must have been mistaken as to what they observed from the surveillance camera. The defendant stated he did not open and close his knees or reach into his crotch as he sat. The defendant explained that the officers' claims that his genitals were exposed when they approached were also untrue. He explained that only a small area of skin (in the genital area) was protruding from his shorts as he sat.

BRADY VIOLATION
(Assignment of Error #1)

In his first assignment of error, the defendant argues that although several references were made to video surveillance, no surveillance tape was ever turned over to the defense. The defendant contends this evidence constituted exculpatory evidence and should have been made available to him prior to trial pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The purpose of pretrial discovery procedures is to eliminate unwarranted prejudice to a defendant that could arise from surprise testimony. State v. Mitchell, 412 So. 2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the state's case against him in order to prepare his defense. State v. Roy, 496 So. 2d 583, 590 (La. App. 1st Cir. 1986), writ denied, 501 So. 2d 228 (La. 1987). If a defendant is lulled into a misapprehension of the strength of the state's case by the failure to fully disclose, such a prejudice may constitute reversible error. State v. Ray, 423 So. 2d 1116, 1118 (La. 1982).

Under the United States Supreme Court decision in Brady, the state, upon request, must produce evidence that is favorable to the accused where it is material to guilt or punishment. This rule has been expanded to include evidence that impeaches the testimony of a witness where the reliability or credibility of that witness may be determinative of guilt or innocence. Giglio v. U.S., 405 U.S. 150, 154-155, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). Where a specific request is made for such information and the subject matter of such a request is material, or if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the information to the trial judge for an in camera inspection. See U.S. v. Agurs, 427 U.S. 97, 106, 96 S. Ct. 2392, 2399, 49 L. Ed. 2d 342 (1976); State v. Cobb, 419 So. 2d 1237, 1241 (La. 1982).

The test for determining materiality was firmly established in U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), and has been applied by the Louisiana Supreme Court. See State v. Rosiere, 488 So. 2d 965, 970-971 (La. 1986). As set forth in Bagley, the 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. Bagley, 473 U.S. at 682, 105 S. Ct. at 3383.

Prior to trial, the defendant herein filed a “Motion for Discovery” and a “Motion to Discover and Disclose Evidence Favorable to Defense.” During the preliminary examination proceeding and at the trial, Sgts. Wild and Holmes both testified that prior to approaching the defendant on the date in question, they had conducted video surveillance of the defendant using surveillance cameras located at Capitol Park. They later set up additional surveillance using binoculars to obtain a clearer view of defendant’s actions. The defendant was observed pulling his shorts to the side and positioning them in a manner to expose his genitals whenever cars would pass by.

On appeal, the defendant complains that the first knowledge he had of any surveillance was when the officers were questioned at the trial. Even assuming *arguendo* that the state violated discovery, the transcripts of the preliminary examination and the trial indicate that the defense failed to lodge a contemporaneous objection to the alleged discovery violation. Even after having learned (from the testimony at the preliminary examination) of the fact that he had been subjected to video surveillance, the defendant proceeded to trial without ever objecting to the timeliness of the disclosure of this information. Under LSA-Cr.P. art. 841, an irregularity or error cannot be appealed after a verdict unless it was objected to at the time of the occurrence. In State v. Bennett, 591 So. 2d 1193 (La. App. 1st Cir. 1991), writ denied, 594 So. 2d 1315 (La. 1992), the defendant, in one of his assignments of error, objected to the testimony of two of the state's witnesses saying that he had not been provided with any information about them during open-file discovery and accordingly had been denied the opportunity to evaluate the testimony and/or prepare his defense. This court noted that one of the two witnesses did not testify at the trial and that the defendant had not lodged a

contemporaneous objection to the other's during the trial. Thus, based on LSA-C.Cr.P. art. 841, this court refused to review the assignment. Bennett, 591 So. 2d at 1197. We see no basis for deviating from this procedural requirement herein.

The purpose of the contemporaneous objection rule is to allow a trial judge the opportunity to rule on the objection and thereby prevent or cure an error. State v. Hilton, 99-1239, p. 12 (La. App. 1st Cir. 3/31/00), 764 So. 2d 1027, 1035, writ denied, 2000-0958 (La. 3/9/01), 786 So. 2d 113. The rule also prevents a defendant from "sitting on" an error and gambling unsuccessfully on the verdict, then later resorting to an appeal on an error that might have been corrected at trial. State v. Duplissey, 550 So. 2d 590, 593 (La. 1989). Because the defendant herein failed to make any type of contemporaneous objection to the alleged failure to disclose surveillance evidence, he is precluded from raising this argument on appeal. Accordingly, this assignment of error presents nothing for review.

SUFFICIENCY OF THE EVIDENCE
(Assignment of Error #2)

In his second assignment of error, the defendant asserts the evidence was insufficient to support the conviction of obscenity. Specifically, the defendant argues the state failed to prove the essential element of intentional exposure.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); State v. Mussall, 523 So. 2d 1305, 1308-1309 (La. 1988).

Louisiana Revised Statute 14:106 provides, in pertinent part:

A. The crime of obscenity is the intentional:

(1) Exposure of the genitals . . . in any public place or place open to the public view . . . with the intent of arousing sexual desire or which appeals to prurient interest or is patently offensive.

The elements of the crime required the state to prove (a) that defendant exposed his genitals in public, and (b) the exposure either (1) was done with the intent of arousing sexual desire or (2) appealed to the prurient interest or (3) was patently offensive. State v. Gradick, 29,231, p. 5 (La. App. 2nd Cir. 1/22/97), 687 So. 2d 1071, 1073.

Since only the defendant and the investigating officers who were eyewitnesses testified, the trial court was required to make a credibility determination. The defendant claimed he was innocently seated in the park making jewelry when approached by the officers. He claimed his hands were near his lap as he worked from a black tray he had positioned there. He denied ever moving his knees or intentionally exposing any part of his genitals. Insofar as the alleged exposure after the officers approached, the defendant claimed he had on shorts and the position in which he was seated caused “a little skin” in his genital area to become exposed. The defendant did not recall whether he was wearing underwear.

Despite the defendant’s claim that “a little skin” was accidentally exposed as he sat down, the guilty verdict returned indicates that the court obviously decided that the officers were more credible. We find the testimony of the officers was sufficient to establish the essential elements of the crime. Both officers testified that the defendant was observed putting his hand in his crotch area and pulling his shorts to the side, intentionally exposing his genitals as cars passed the area where he sat. The officers further testified that upon approaching the defendant, they observed his exposed penis. It is well established that, in the absence of internal

contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. State v. Thomas, 2005-2210, p. 8 (La. App. 1st Cir. 6/9/06), 938 So. 2d 168, 174, writ denied, 2006-2403 (La. 4/27/07), 955 So. 2d 683. In a case of obscenity, a victim's or witness's testimony is sufficient to establish that an obscene public exposure occurred. See State v. Magee, 517 So. 2d 464, 466 (La. App. 1st Cir. 1987).

As the trier of fact, the trial court was free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. As an appellate court, we will not reweigh the evidence to overturn a fact finder's determination of guilt. State v. Taylor, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. See also State v. Mitchell, 99-3342, p. 8 (La. 10/17/00), 772 So. 2d 78, 83.

After a thorough review of the record, we find that the evidence presented in this case supports the trial court's verdict. We are convinced that viewing the evidence in the light most favorable to the state, a rational trier of fact could have concluded that the state proved beyond a reasonable doubt the essential elements of the crime of obscenity. This assignment of error is without merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.