

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD SMITH, JR.,

Defendant-Appellant.

UNPUBLISHED

August 24, 2004

No. 246931

Wayne Circuit Court

LC No. 01-014154-01

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

MEMORANDUM.

Defendant appeals as of right his jury convictions for felonious assault, MCL 750.82, and felony-firearm, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that he was denied a fair trial by the prosecutor's failure to provide requested discovery material. This court will review a trial court's action regarding a prosecutor's failure to provide discovery for abuse of discretion. *People v Johnson*, 206 Mich App 122, 126; 520 NW2d 672 (1994).

A criminal defendant has a due process right of access to certain information possessed by the prosecution that might lead a jury to entertain a reasonable doubt about a defendant's guilt. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecutor suppressed the favorable evidence; and (4) that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Lester*, 232 Mich App 262, 282-283; 591 NW2d 267 (1998). To merit reversal, the undisclosed evidence must have been material. Undisclosed evidence will only be deemed material if it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id.*, 282.

The trial court remedied the prosecutor's failure to provide defendant with a witness's statement by instructing the jury to disregard her identification testimony. Given this instruction, the failure to provide defendant with the statement did not have a reasonable probability of affecting the outcome of the case. Similarly, the failure to provide defendant with complainant's shorts to allow defendant to test them to show that a hole was not the result of a bullet was

immaterial where the witness never testified that there was such a hole. There was no showing that the prosecutor deliberately withheld exculpatory evidence.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly