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NO. 93293-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

ASENCION SALGADO-MENDOZA,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

This supplemental brief expands upon arguments contained in the State's Appellant's Brief and Petition for Review. The State's decision not to address certain issues in this supplemental brief should not be considered as a concession, but should be interpreted as the State's determination that the unaddressed issues are adequately discussed in its other briefs.

II. STATEMENT OF ISSUES

1. Whether the State complies with its discovery obligations by providing the defendant with the names of all potential witnesses and a summary of the anticipated testimony of each of the potential witnesses? identifying every witness it may call at trial and providing a synopsis of the potential witnesses' anticipated testimony?

2. Whether a defendant, who seeks sanctions for an alleged discovery violation, must demonstrate actual prejudice to *his* ability to obtain a fair trial?

3. Whether a defendant, who seeks sanctions for an alleged discovery violation, must demonstrate that the State's actions, rather than those of his attorney, created the Hobson's Choice of a delayed trial or of proceeding to trial with a possibly inadequately prepared counsel?

III. ARGUMENT

A. The State's Discovery Obligations Are Fully Met By The Disclosure of All Potential Witnesses.

The State has an obligation under CrRLJ 4.7(a) to disclose numerous items of information to the defendant prior to trial. The purpose of this discovery rule is "to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process. . ." *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988) (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub'g Co. ed. 1971)). Consistent with these goals, the State's duty to disclose is not limited to those items and those witnesses that the prosecution absolutely intends to use at trial. Instead, the State's duty to disclose extends to any information that the State *may* use at trial. *See, e.g., State v. Dunivin*, 65 Wn. App. 728, 732, 829 P.2d 799, *review denied*, 120 Wn.2d 1016 (1992) (the prosecutor's subjective intent is irrelevant to the obligation to disclose; the obligation to disclose extends even to evidence that the State is reasonably certain it may not use at trial).

One of the items the State is required to disclose is a list of witnesses who it may call at trial, along with a description of the substance of each witnesses' anticipated testimony. *See* CrRLJ 4.7(a)(1). This information

allows the defendant to prepare his defense. The list of possible witnesses also aids in eliminating jurors, who due to relationships or biases to a potential witness, are not competent to serve. The listing of all possible witnesses also honors the United State Supreme Court's exhortations to prosecutors to err on the side of providing discovery to a defendant. *Kyles v. Whitley*, 514 U.S. 419, 439-40, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (stating that prosecutors should not be discouraged from providing discovery); *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) ("The prudent prosecutor will resolve doubtful questions in favor of disclosure.").

Washington, like virtually every other jurisdiction,¹ authorizes the imposition of sanctions upon the State for the late disclosure of witnesses. *See, e.g., State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980) (dismissal of charges based, in part, upon the State's failure to disclose its witness list until 1 court day before trial); *State v. Beliz*, 104 Wn. App. 206, 211-12, 15 P.3d

¹Numerous federal courts authorize sanctions for the prosecution's tardy disclosure of witnesses. *See, e.g., United States v. Collins*, 799 F.3d 554, 573-74 (6th Cir.), *cert. denied*, 136 S. Ct. 601 (2015) (sanctions imposed where prosecution disclosed three potential witnesses – five days before the trial was scheduled to begin – when defense requested this information 14 months prior to trial); *United States v. Sims*, 776 F.3d 583 (8th Cir. 2015) (DNA expert witness excluded when the government's late notice made it impossible for defendant to review new DNA evidence, prepare for cross examination, or arrange for his own expert). Many of our sister states authorize sanctions for the prosecution's untimely disclosure of witnesses. *See, e.g., State v. Tucker*, 157 Ariz. 433, 759 P.2d 579 (1988) (sanctions available for the prosecutor's late production of its witness list); *People v. Hammond*, 22 Cal App. 4th 1611, 28 Cal. Rptr. 2d 180 (1994) (sanctions may be imposed for the prosecution's failure to disclose the names of witnesses that the State "reasonably anticipates it is likely to call" in its case-in-chief or in rebuttal).

683 (2001) (State's late disclosure of witnesses resulted in exclusion of their testimony).

Except for the instant case, no Washington appellate court decision authorizes the imposition of sanctions upon the State based upon the State's identification of individuals on its witness list who did not actually testify at trial. *See State v. Salgado-Mendoza*, 194 Wn. App. 234, 258-59, 373 P.3d 357, *review granted*, ___ Wn.2d ___ (Nov. 1, 2016) (Worswick, J., dissenting). To the contrary, this Court has expressly rejected the notion that the State violates CrR 4.7² by not calling an identified witness at trial. *State v. Thomas*, 150 Wn.2d 821, 852, 83 P.3d 970 (2004). The State's obligation under the discovery rules "is to provide a list of witnesses, not a guaranty of who will testify." *Id.*, at 852.

Neither the majority opinion nor Salgado-Mendoza's pleadings identify any court case where sanctions have been imposed upon the prosecution for not calling every person identified on the prosecution's witness list. *See Salgado-Mendoza*, 194 Wn. App. at 258 (Worswick, J., dissenting) ("it is important to note that the majority opinion cites to no case

²Many of the cases cited in this brief involve CrR 8.3(b) or CrR 4.7. These superior court rules are substantially similar to CrRLJ 8.3(b) and CrRLJ 4.7. This Court frequently relies upon cases discussing the superior court rules when resolving appeals related to cases arising from courts of limited jurisdiction. *See, e.g. City of Seattle v. Holifield*, 170 Wn.2d 230, 238, 240 P.3d 1162 (2010) (in a decision addressing the range of sanctions available under CrRLJ 8.3(b), the Court relied upon cases applying CrR 8.3(b), noting that "[t]he language of CrR 8.3(b) is identical to CrRLJ 8.3(b), the rule before us here.").

where the state was deemed to have committed misconduct when it provided all possible discovery several months prior to trial"). Their failure to do allows this Court to assume that, after diligent search, neither the Court of Appeals nor Salgado-Mendoza were able to locate authorities in support of their claim that the prosecution violates discovery rules and/or the defendant's rights by identifying more people on its witness list than are actually called at trial. See, e.g., *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). The assumption that no authorities exist to support the majority opinion's new rule is supported by the existence of numerous cases which reject a defendant's assertion that his rights were violated by the prosecution's failure to call to the stand, a person whose name appears on the prosecution's witness list.

The State does not violate defendant's due process right to exculpatory evidence by not calling a person who was listed on its witness list. See *Thomas*, 150 Wn.2d at 852-53. The State does not violate a defendant's confrontation rights by failing to call a person who was listed on its witness list. *Cooper v. California*, 386 U.S. 58, 62 n.2, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967) (rejecting as "absolutely devoid of merit," petitioner's contention that the prosecution's failure to produce a particular witness violated the petitioner's right of confrontation); *United States v. Morgan*, 757 F.2d 1074, 1076 (10th Cir. 1985) ("[T]he Confrontation Clause is not a

guarantee that the prosecution will call all the witnesses it has against the defendant.”).

The State does not impermissibly interfere with a defendant’s trial strategy by forgoing the testimony of individuals who were listed on its witness list. *See, e.g., Loher v. Thomas*, 825 F.3d 1103, 1119 (9th Cir. 2016) (defendant, not the prosecution, was responsible for the absence of defense witnesses which compelled the defendant to testify before his other witnesses, when the prosecution unexpectedly called only four of the fourteen witnesses on its witness list). The State does not engage in misconduct when it includes an individual on its witness list read to the prospective jurors during voir dire and does not call the individual as a witness at trial. *United States v. Robinson*, No. 06-1800, 272 Fed. Appx. 421, 2007 U.S. App. LEXIS 27698 at ** 38-40, 2007 WL 4153412 (6th Cir. Nov. 19, 2007) (unpublished opinion), *cert. denied*, 552 U.S. 1289 (2008).³

The State should be praised, not sanctioned, for providing a defendant with all possibly relevant discovery in a timely manner. The Court of Appeals’ decision to the contrary must be reversed.

³As required by GR 14.1(d), a copy of this opinion may be found in appendix A.

B. Possible Prejudice to a Non-Party is Insufficient to Support Sanctions Pursuant to CrRLJ 8.3(b) and/or CrRLJ 4.7(g)(7).

A defendant may request, pursuant to CrRLJ 8.3(b) and/or CrRLJ 4.7(g)(7), that sanctions be imposed upon the State for an alleged discovery violation. The discovery rules, CrR 4.7(h)(7)(i) and CrRLJ 4.7(g)(7)(i), do not require the exclusion of undisclosed evidence as a sanction. *State v. Perez*, 137 Wn. App. 97, 109, 151 P.3d 249 (2007). The discovery rules authorize a wide range of sanctions, including continuance, recess, suppression of evidence, exclusion of witnesses, mistrial, dismissal of charges, and attorney fees. *See generally State v. Grassman*, 175 Wn.2d 208, 210-11, 283 P.3d 1113 (2012) (attorney fees); *City of Seattle v. Holifield*, 170 Wn.2d 230, 236-39, 240 P.3d 1162 (2010) (suppression of evidence); *State v. Greiff*, 141 Wn.2d 910, 923, 10 P.3d 390 (2000) (mistrial); *State v. Linden*, 89 Wn. App. 184, 947 P.2d 1284 (1997), *review denied*, 136 Wn.2d 1018 (1998) (recess); CrRLJ 4.7(g)(7); CrR 4.7(h)(7). The harshest sanction of dismissal of charges is limited to those cases in which the failure to disclose the information in a timely manner materially affected the accused's right to a fair trial. *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2008). Even the lesser sanction of suppression of evidence requires the defendant to establish prejudice to the defendant's right to a fair trial. *See, e.g. Holifield*, 170 Wn.2d at 237 n.5.

A trial court's decision whether to impose sanctions and which sanction to impose is reviewed for abuse of discretion. *See, e.g., State v. Barry*, 184 Wn. App. 790, 796-97, 339 P.3d 200 (2014). A trial court abuses its discretion only if no reasonable person would take the view adopted by the trial court or if the trial court's decision is manifestly unreasonable or based upon untenable grounds. *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000); *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). An appellate court, moreover, will not interfere with a trial court's denial of a motion for sanctions pursuant to CrRLJ 4.7(g)(7) or CrRLJ 8.3(b) unless the defendant can demonstrate actual prejudice. *See State v. Bradfield*, 29 Wn. App. 679, 682, 630 P.2d 494; *review denied*, 96 Wn.2d 1018 (1981) ("Absent some showing of actual prejudice, we will not interfere with the trial court's exercise of discretion in denying sanctions pursuant to CrR 4.7(h)(7)(i).").

A defendant who seeks sanctions for an alleged discovery violation must provide the trial court with proof that (1) the State violated the discovery rules, and (2) the violation prejudiced the defendant's ability to obtain a fair trial. *See Michielli*, 132 Wn.2d at 239-40; *State v. Kone*, 165 Wn. App. 420, 432-33, 266 P.3d 916 (2011). A defendant's failure to establish either element will result in a denial of the defendant's sanction motion. *See, e.g., State v. Krenik*, 156 Wn. App. 314, 231 P.3d 252 (2010)

(sanctions properly denied where defendant failed to establish actual prejudice from the prosecutor's noncompliance with the discovery rule); *State v. Smith*, 67 Wn. App. 847, 854, 841 P.2d 65 (1992), *review denied*, 121 Wn.2d 1019 (1993) (sanctions properly denied where defendant failed to establish by a preponderance of the evidence that the late disclosure of witnesses was due to the State's lack of diligence).

In this case, as discussed in section III. A., Salgado-Mendoza failed to establish that the State violated CrRLJ 4.7. In addition, as discussed *infra*, Salgado-Mendoza also failed to prove that his ability to obtain a fair trial was prejudiced as required by both CrRLJ 4.7(g)(7) and CrRLJ 8.3(b).

Before a trial court may impose sanctions under CrRLJ 8.3(b), the defendant must demonstrate that the prosecution's mismanagement produced "prejudice to the rights of the *accused* which materially affect the *accused's* right to a fair trial." CrRLJ 8.3(b) (emphasis added). Prejudice to someone other than the accused is insufficient to impose sanctions. In the instant case, however, the Court of Appeals imposed the sanction of witness exclusion because the State's failure to whittle down its list of possible toxicology witnesses was unduly burdensome to *defense counsel*. *Salgado-Mendoza*, at 249. Prejudice to defense counsel, if caused by the State's bad faith and willful violation of the discovery rules, may justify an award of attorney fees, but will not support the exclusion of evidence or dismissal of charges. *See*

State v. Grassman, supra; CrRLJ 4.7(g)(7)(iii).

The fact that prejudice to defense counsel, rather than prejudice to the accused's ability to obtain a fair trial, is insufficient to support the imposition of sanctions is further underscored by a survey of appellate court cases. This Court's cases establish that the prejudice must relate to the presentation of the defendant's case to the jury and/or must have a "bearing on the ultimate outcome at trial." *Greiff*, 141 Wn.2d at 92. Other claims of prejudice will not support the imposition of sanctions. *See generally State v. Rohrich*, 149 Wn.2d 647, 655-56, 71 P.3d 638 (2003) (dismissal of charges pursuant to CrR 8.3(b) not appropriate based upon the inability to join the dismissed charge with another charge, the inability to enter into a global plea agreement, by separate sentencing for this offense and the other charge, by the loss of an opportunity to serve but one period of community supervision for the current charge and the other charge, and by the possibility that the prior conviction could be used to impeach him, because these claims do not affect the defendant's right to a fair trial).

The additional hours that Salgado-Mendoza's counsel might have devoted to trial preparation is similar to the out-of-court prejudice rejected as inadequate to support a sanction by this Court in *Rohrich*. The Court of Appeals' decision to the contrary must be reversed.

C. The State is Not Responsible for Defense Counsel's Decision to Not Prepare Until the Eve of Trial.

Salgado-Mendoza, the superior court, and the Court of Appeals contend that the failure to identify which of the toxicologists whose names appeared on the prosecution's witness list would actually take the stand until the morning of trial imposed a "Hobson's Choice" upon the defendant of delaying trial or of proceeding to trial with a potentially unprepared attorney. *See* CP 42, CP 59, and *Salgado-Mendoza*, 194 Wn. App. at 249.

Before any sanction can be imposed for such a "Hobson's Choice," Salgado-Mendoza must prove by a preponderance of the evidence that the interjection of new facts into the case compelled the defendant to choose between prejudicing his right to a speedy trial or his right to be represented by counsel who has sufficient opportunity to adequately prepare a material part of his defense. *State v. Ramos*, 83 Wn. App. 622, 636-639, 922 P.2d 193 (1996) (citing to *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980)). Salgado-Mendoza's failure to establish that his time for trial period under CrRLJ 3.3 would have expired if the trial court granted his counsel's desired continuance, is fatal to his claim of prejudice. *See, e.g., Barry*, 184 Wn. App. at 799 (the denial of sanctions for the State's discovery violations affirmed when a continuance would not cause a violation of the defendant's time for trial rights); *Krenik*, 156 Wn. App. at 321 (defendant's claim that she

was forced to choose between the right to a speedy trial and the right to prepare an adequate defense rejected because the defendant where defendant “made no showing before the trial court and [did] not argue on appeal that her time for trial period under CrR 3.3 would have expired had the trial court granted a request for a continuance”).

The record, moreover, establishes that Salgado-Mendoza’s counsel’s inaction, rather than any action of the State, created the alleged “Hobson’s Choice.” The record establishes that the State’s editing of it’s witness list did not interject new facts into the case. *See, e.g., State v. Greene*, 49 Wn. App. 49, 57, 742 P.2d 152 (1987) (a sanction for failing to provide timely discovery requires the defendant to prove, by a preponderance of the evidence, that interjection of new facts into the case will compel the defendant to prejudice either right).

The State filed its witness list on December 10, 2012. CP 6. This witness list provided notice that in addition to the arresting officer and a BAC Technician, the State intended to call at trial:

Toxicologists, Washington State Patrol, (206) 262-6100, one of the following will appear for the jury trial and testify to the Widmark's formula, Retrograde Extrapolation, effects of alcohol, effects of drugs, BAC testing procedures and processes, BAC equipment maintenance quality assurance, etc.

Christopher S. Johnston, Brittany Ball, Justin L. Knoy, Asa J. Louis, Brianne O'Reilly, Lisa Noble, Naziha Nuwayhid or

Dawn Sklerov or Sarah Swenson.

Id. . Full discovery was provided as to each of the nine toxicologists. *See* CP 40, ¶ 5.⁴

Salgado-Mendoza's case was called for trial five months later on May 9, 2013. *See* RP (May 9, 2013). Salgado-Mendoza scheduled a motion to dismiss charges or to suppress the testimony of the toxicologists, for the morning of trial.

Salgado-Mendoza's motion and the supporting declaration does not claim that the discovery related to the toxicologists was deficient.⁵ Salgado-Mendoza motion did not claim that the State interfered in any way with his access to the toxicologists or the discovery. Salgado-Mendoza's written motion did not argue that defense counsel could not prepare for trial with the information provided by the State. *See* CP 39-44.

Salgado-Mendoza's written materials and oral presentation related to his motion to dismiss or suppress contain admissions that defense counsel did not begin to review any of the discovery regarding the toxicologists until approximately one week prior to trial. *See generally* RP (May 9, 2013) at 20-21; CP 40-41. At that point, Salgado-Mendoza's attorney ceased his

⁴The Washington State Patrol website that Salgado-Mendoza's counsel refers to in his declaration may be found at <http://www.wsp.wa.gov/forensics/toxicology.htm> (last visited Nov. 30, 2016).

⁵The only complaint voiced by Salgado-Mendoza regarding the provided discovery was that it "exceed[ed] 170 pages." CP 40 ¶ 5.

preparations because preparing to cross-examine each of the toxicologists identified on the State's witness list would result in a "tremendous and needless waste of [his] time." CP 40, ¶ 5. *See also* RP (May 9, 2016) at 21 (asserting that the failure to identify the toxicologist who will actually appear for trial "unnecessarily increases the workload of the defense counsel), Salgado-Mendoza's attorney further took the position that it was not his obligation to conduct the investigation⁶ necessary to enable him to pursue a possible avenue of impeachment based upon prior laboratory scandals. *See* RP (May 9, 2016) at 23-25.

It was Salgado-Mendoza's counsel's inaction, rather than the State's actions, that caused the alleged "Hobson Choice" that the Court of Appeals and Salgado-Mendoza identify as the sole prejudice that the accused experienced from the State's failure to whittle down its witness list prior to the morning of trial. *See* CP 42 ¶ 10; RP (May 9, 2013) at 36-37. Fortunately, Salgado-Mendoza's counsel's lack of diligence did not prejudice Salgado-Mendoza's right to a fair trial as the foregone investigation would

⁶This position is at odds with American Bar Association, *Criminal Justice: The Defense Function* (Fourth Edition), Standard 4-4.1 (available at http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html (last visited Nov. 30, 2016)). This standard provides, in relevant part, that defense counsel has a duty to investigate in all cases and that defense counsel's investigative efforts should commence promptly. The investigation should include "potential avenues of impeachment of prosecution witnesses." Std. 4-4.1(c).

not have turned up admissible evidence⁷ and his counsel's cross-examination of the toxicologist⁸ was "thorough" and "text-book"-like. *Salgado-Mendoza*, 194 Wn. App. at 256-57 (Worswick, J., dissenting). Salgado-Mendoza tacitly acknowledges that his counsel's cross-examination was adequate, as he did not assert an ineffective assistance of counsel claim.

The Court of Appeals' decision that the State should be sanctioned through the suppression of important relevant evidence, punishes the wrong person. The Court of Appeals' decision must be reversed.

III. CONCLUSION

The district court judge did not abuse her discretion by denying Salgado-Mendoza's CrRLJ 8.3(b) and CrRLJ 4.7(g)(7) motion to exclude the state toxicologist's testimony. The Court of Appeals' decision must be reversed and the matter remanded for a new trial⁹ at which the State may call

⁷After providing Salgado-Mendoza with an opportunity for in-court discovery regarding the called toxicologist's involvement in the laboratory scandals, the trial court ruled that Salgado-Mendoza could not introduce evidence of the scandals. Salgado-Mendoza did not appeal this decision. *Salgado-Mendoza*, 194 Wn. App. at 256 (Worswick, J., dissenting).

⁸Salgado-Mendoza's cross-examination of the toxicologist, Mr. Johnston, may be found at RP (May 9, 2013) 240-261.

⁹The Superior Court reversed Salgado-Mendoza's conviction on the independent ground that the trial court had abused its discretion by excluding testimony from Salgado-Mendoza's expert witness regarding the breathalyzer machine. CP 66. The Court of Appeals denied discretionary review of that decision. *Salgado-Mendoza*, 194 Wn. App. at 243 ("As a preliminary matter, we note that regardless of our decision, this case will be remanded for a new trial based on the district court's error in excluding portions of the defense expert witness's testimony because we did not accept discretionary review of that issue.")

one or more toxicologists who are named on the State's witness list and/or
any amendments to the State's witness list.

Respectfully Submitted this 2nd day of December, 2016.

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has been screened from this matter since assuming office.

PROOF OF SERVICE

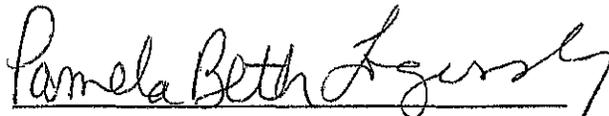
I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 2nd day of December, 2016, I served a copy of the document to which this proof of service is attached by e-mail, pursuant to an agreement with counsel, to

Skylar Brett at skylarbrettlawoffice@gmail.com

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 2nd day of December, 2016, at Olympia, Washington.



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Appendix A

United States v. Robinson

United States Court of Appeals for the Sixth Circuit

November 19, 2007, Filed

File Name: 07a0809n.06

No. 06-1800

Reporter

272 Fed. Appx. 421 *; 2007 U.S. App. LEXIS 27698 **; 2007 FED App. 0809N (6th Cir.)

United States of America, Plaintiff-Appellee, v. Edward Robinson, Defendant-Appellant.

Case Summary

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: US Supreme Court certiorari denied by Robinson v. United States, 552 U.S. 1289, 128 S. Ct. 1726, 170 L. Ed. 2d 529, 2008 U.S. LEXIS 2835 (2008)

Magistrate's recommendation at Habeas corpus proceeding at United States v. Robinson, 2009 U.S. Dist. LEXIS 126838 (E.D. Mich., Feb. 27, 2009)

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

United States v. Robinson, 2006 U.S. Dist. LEXIS 4674 (E.D. Mich., Jan. 24, 2006)

Core Terms

district court, defense counsel, cocaine, informant, funds, shirt, witnesses, pre-recorded, cross-examination, Narcotics, fingerprint, admissible, apartment, confidential informant, defendant argues, false statement, affiant, motive, gun, misconduct, probable cause, aggressively, exculpatory, searched, firearm, shot, opening statement, prior to trial, search warrant, trial court

Procedural Posture

Defendant appealed a decision of the U.S. District Court for the Eastern District of Michigan, which convicted him on three counts of drug offenses, violations of 21 U.S.C.S. § 841(a)(1) and § 846, and being a felon in possession of a firearm, a violation of 18 U.S.C.S. § 922(g)(1). Defendant's claims included violations of the Fifth and Sixth Amendments, evidentiary violations, and violations of Fed. R. Crim. P. 16 and Brady.

Overview

Officers with a warrant forcibly entered an apartment after receiving no response to a knock and announce. An officer shot defendant after defendant pointed a gun at him. The court held that defendant's Sixth Amendment confrontation rights were not violated when an officer was permitted to testify concerning information the police had received about there being a known shooter on the premises because the information was offered not for the truth of the matter asserted, but rather to explain, in response to defense inquiries, why the police did not wait longer after announcing their presence before breaking down the door. The court also held that the trial court did not err in precluding defense counsel from cross-examining the officer concerning three prior incidents in which the officer discharged his weapon because evidence of prior acts was not admissible to show criminal disposition or propensity under Fed. R. Evid. 404(b). There was also no error in the admission of medical records which indicated that defendant had cocaine in his system at the time he was arrested because the evidence made it more probable than not that he acted aggressively by pulling a firearm.

Outcome

The court affirmed defendant's convictions.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Search
Warrants > Affirmations & Oaths > Sufficiency Challenges

Criminal Law & Procedure > ... > Standards of
Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > De
Novo Review > General Overview

HN1 Upon review of a district court's ruling on a Franks challenge, the court of appeals reviews de novo the district court's legal conclusions, and it reviews the district court's findings of fact for clear error.

Criminal Law & Procedure > ... > Search
Warrants > Affirmations & Oaths > Sufficiency Challenges

HN2 The first step in the Franks analysis is to determine whether a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit. Mere inadvertence or negligence in making erroneous statements is insufficient to require exclusion. If the affidavit is found to contain false statements knowingly or recklessly made, then the next step in the analysis is to determine with the affidavit's false material set to one side, whether the affidavit's remaining content is insufficient to establish probable cause. If the affidavit, minus any recklessly or intentionally made and materially false statements, no longer establishes probable cause, then the court must hold the search warrant invalid.

Criminal Law & Procedure > ... > Search
Warrants > Probable Cause > General Overview

HN3 To demonstrate probable cause to justify the issuance of a search warrant, an affidavit must contain facts that indicate a fair probability that evidence of a crime will be located on the premises of the proposed search. Where the affidavit is based in large part on information provided by a confidential informant, the court must consider the veracity, reliability, and basis of knowledge for that information as part of the totality of the circumstances for evaluating that information. However, the affiant need only specify that the confidential informant has given accurate information in the past to qualify the informant as reliable.

Constitutional Law > ... > Fundamental Rights > Criminal

Process > Right to Confrontation

Criminal Law & Procedure > ... > Standards of Review > De
Novo Review > General Overview

HN4 A court of appeals reviews the question of whether the admission of evidence violates the Sixth Amendment Confrontation Clause de novo.

Constitutional Law > ... > Fundamental Rights > Criminal
Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's
Rights > Right to Confrontation

HN5 The Confrontation Clause of the Sixth Amendment gives a criminal defendant the right to confront the witnesses against him and the opportunity to cross-examine such witnesses. The provision bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant has had a prior opportunity for cross-examination. However, the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.

Evidence > Admissibility > Procedural Matters > Curative
Admissibility

HN6 Where one party has opened the door on an issue, the opponent, in the trial court's discretion, may introduce evidence on the same issue to rebut any false impression that may have been created by the earlier admission of evidence.

Criminal Law & Procedure > ... > Standards of
Review > Abuse of Discretion > Evidence

Evidence > Admissibility > Procedural Matters > Rulings on
Evidence

HN7 A court of appeals reviews a district court's evidentiary rulings for an abuse of discretion. A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact. The lower court's ruling will be reversed only if the court of appeals is firmly convinced that a mistake has been made.

Evidence > Admissibility > Conduct Evidence > Prior Acts,
Crimes & Wrongs

HN8 See Fed. R. Evid. 404(b).

Evidence > Admissibility > Conduct Evidence > Prior Acts,
Crimes & Wrongs

HN9 In determining the admissibility of evidence under Fed. R. Evid. 404(b), a district court must apply a three-step analysis: (1) Is there sufficient evidence that the other act in question actually occurred; (2) Is the evidence of the other act probative of a material issue other than character; and (3) does the probative value of the evidence substantially outweigh its potential unfair prejudicial effect.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN10 Under Fed. R. Evid. 404(b), evidence of prior acts is not admissible to show criminal disposition or propensity. Fed. R. Evid. 404(b) applies to any person, and contemplates the prior act by another person being offered as exculpatory evidence by the defendant as "reverse 404(b) evidence." However, evidence of prior acts of a third party offered by a defendant is subject to the same strictures and analysis as Fed. R. Evid. 404(b) evidence offered by the government.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN11 A person's propensity to act in a certain way is not a ground for the admission of prior act evidence under Fed. R. Evid. 404(b).

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN12 Under Fed. R. Evid. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed. R. Evid. 403. The district court has broad discretion in determining whether the danger of unfair prejudice outweighs the probative value of the evidence.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN13 A complete defense does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Evidence > ... > Examination > Cross-Examinations > Scope

HN14 Not all limitations on cross-examination have constitutional implications and courts are accorded broad discretion in limiting cross-examination. Limitations on specific inquiries by the defense are permissible so long as the jury has sufficient other information upon which it may make a discriminating appraisal of the witness's motives and bias.

Evidence > Relevance > Relevant Evidence

HN15 Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

Evidence > ... > Procedural Matters > Preliminary Questions > Credibility & Weight of Evidence

Evidence > Admissibility > Expert Witnesses

HN16 Weakness in the factual basis for an expert opinion goes to weight of evidence rather than admissibility.

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery by Defendant > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Discovery

HN17 A court of appeals reviews a district court's decisions under Fed. R. Crim. P. 16, as well as the denial of a mistrial due to delayed disclosure of evidence, for abuse of discretion.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN18 A district court's determination as to the existence of a Brady violation is reviewed de novo.

Criminal Law & Procedure > ... > Discovery by Defendant > Reports of Examinations & Tests > General Overview

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

HN19 Fed. R. Crim. P. 16 provides that the government, upon request by a defendant, must permit the defendant

to inspect and to copy or photograph papers or tangible objects if the item is within the government's possession, custody, or control and is material to preparing the defense, intended for use in the government's case in chief, or belongs to the defendant. Fed. R. Crim. P. 16(a)(1)(E). Fed. R. Crim. P. 16 also provides that the government must permit defendant to inspect and copy or photograph the results or reports of any scientific test if: (1) the item is within the government's possession, custody, or control; (2) counsel for the government knows or should have known of the item's existence through the exercise of due diligence; and (3) the item is either material to the preparation of the defendant or intended for use during the government's case in chief. Fed. R. Crim. P. 16(a)(1)(F).

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery by Defendant > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery Misconduct > General Overview

HN20 If the trial court finds that a violation of Fed. R. Crim. P. 16 has occurred, the court may impose a number of sanctions, including entering an order mandating discovery or inspection, granting a continuance, excluding the undisclosed evidence, or granting any other remedy that is just under the circumstances. Fed. R. Crim. P. 16(d)(2). In deciding the appropriate remedy, the court considers: (1) the reasons for any delay in producing materials, including ill intent or bad faith; (2) the degree of prejudice, if any, to the defendant; and (3) whether any prejudice may be cured with a less severe course of action like a continuance or a recess.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN21 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. To establish a Brady violation, the defendant must show that: (1) the evidence must be favorable to the defendant because of its exculpatory or impeaching nature; (2) the evidence was willfully or inadvertently suppressed by the government; and (3) the defendant was prejudiced. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different. Evidence is favorable to the defendant if it exculpates the defendant or enables the defendant to impeach witnesses.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN22 Brady generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose. Delay only violates Brady when the delay itself causes prejudice.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN23 Brady and its progeny have recognized a duty on the part of the prosecutor to disclose material evidence that is favorable to the defendant over which the prosecution team has control. Brady does not impose a duty upon the government to discover information which it does not possess.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN24 There is no Brady violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question.

Criminal Law & Procedure > Trials > Jencks Act > General Overview

HN25 Fed. R. Crim. P. 16 does not authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C.S. § 3500. No statement made by a government witness other than the defendant shall be subject to discovery or inspection until that witness has testified on direct examination in the trial of the case.

Constitutional Law > ... > Fundamental Rights > Criminal Process > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN26 Pretrial disclosure of exculpatory or impeachment evidence is not necessarily required under Brady. As a general proposition, there is no general constitutional right to discovery in a criminal case, and Brady did not create one. Where a defendant claims a violation of Brady because of the government's failure to produce impeachment evidence, so long as the defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, the U.S.

Constitution is not violated.

Criminal Law & Procedure > Appeals > Reversible Error > Prosecutorial Misconduct

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN27 A court of appeals reviews the question of whether prosecutorial misconduct requires reversal de novo. The court's review of a prosecutorial misconduct claim involves a two-step analysis: (1) were the prosecutor's remarks improper; and (2) were the remarks sufficiently flagrant to warrant reversal. In determining whether the conduct was "flagrant," the court of appeals considers four factors: (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused. In examining prosecutorial misconduct, it is necessary to view the conduct at issue within the context of the trial as a whole.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN28 The accumulation of non-errors cannot collectively amount to a violation of due process.

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For EDWARD ROBINSON JR., Defendant - Appellant: Andrew N. Wise, Penny R. Beardslee, Andrew Densem, Federal Public Defenders Office, Detroit, MI; Loren E. Gross, Federal Defender Office, Detroit, MI.

Judges: BEFORE: MOORE and GRIFFIN, Circuit Judges, and GRAHAM, *

Opinion by: GRAHAM

Opinion

[*424] GRAHAM, District Judge. Defendant-appellant Edward Robinson was indicted in the Eastern District of Michigan on drug and weapons charges allegedly committed on April 22, 2004. In a superseding

*The Honorable James L. Graham, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

indictment filed on December 14, 2005, defendant was charged with conspiracy to possess with intent to distribute and to distribute heroin and more than five grams of cocaine base in violation of 21 U.S.C. § 846 (Count One); possession with the intent to distribute more than five grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) (Count Two); possession with intent to distribute [*2] heroin in violation of § 841(a)(1) (Count Three); using, carrying and brandishing a firearm during and in relation to the drug trafficking crimes charged in Counts 1 through 3 of the indictment in violation of 18 U.S.C. §924(c) (Count Four); and being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1) (Count Six).

Defendant's case proceeded to trial before a jury. The record reveals that on April 19, 2004, a confidential informant working under the supervision of Officer Don Eastman of the Detroit Police Department Narcotics Bureau, was sent to 2701 Chrysler, Apartment Number 1721, to purchase crack cocaine. The transaction was completed, and on April 21, 2004, Officer Eastman obtained a search warrant for the premises. JA 28-29.

The warrant was executed on April 22, 2004, at approximately 9:15 a.m. JA 444. Prior to entry, the officers knocked on the door and announced their presence. JA 449-450. When they received no response, a forced entry was ordered. JA 451. Officer Jerold Blanding of the Narcotics Bureau was the first officer through the door. He was armed with a short-barreled shotgun. JA 444. As Officer Blanding entered the apartment, he saw the defendant [*3] sitting in a chair in the back bedroom. JA 452-53, 495. Three women were also in the apartment. Officer Blanding ordered defendant to show his hands. JA 453-54. Defendant reached with his left hand down to his left side, pulled out a pistol, and leaned forward preparing to aim the pistol at the officer, at which point Officer Blanding shot defendant in the abdomen. JA 455-58. Defendant fell back into the chair, and the gun fell to the left between defendant's leg and the chair. JA 458. Officer Blanding obtained the pistol and placed it on the floor while defendant was being handcuffed. JA 473. Defendant was then transported to the hospital.

Upon searching the apartment, the police observed 135 ten-dollar baggies of crack cocaine, each weighing approximately .101 grams, three baggies of heroin, a razor blade, a scale, and a sifter used to process heroin located on a coffee table near the defendant's chair in the back bedroom. JA 617-618, 630-31, 635, 643-44, [*425] 677-78. A .357 Magnum handgun was found in

the back bedroom under the cushion of a sofa on which a woman was sleeping at the time of the entry. JA 461-62. The officers also recovered \$ 2,495 in cash found in a locked bag located [**4] next to the chair in the bedroom. JA 836-37.

The jury convicted defendant on all counts. The district court imposed a sentence of 120 months on Counts One and Two and 70 months on Counts Three and Six. As to Count Four, the district court declined to find that defendant brandished the firearm, and imposed a consecutive sentence of 60 months for using or carrying a firearm during a drug trafficking offense. JA 1125. Defendant now appeals his convictions.

I.

Defendant raises as error the district court's failure to suppress the evidence obtained as a result of the search warrant. In the affidavit supporting the search warrant, see JA 56, Officer Eastman stated that he is "a member of the Detroit Police Department Narcotics Bureau" and that he "has been assigned in this capacity for approximately seventeen years." He stated that he was seeking a search warrant for 2701 Chrysler, Apartment Number 1721, as well as authorization to search the person of an individual known as "Earl, Jr.," B/M/late 40's, 6'2", 190lbs, and wearing glasses." He further stated:

The affiant is working in conjunction with other members of the Narcotics Bureau, and a registered informant SOI # 2179, who is credible [**5] and reliable, having been utilized by members of the Narcotics Bureau on at least 10 occasions, resulting in the arrests of at least 10 persons for VCSA and related offenses, with at least 5 persons having been convicted in 36 District and 3 Circuit Courts, and with some cases still pending.

On 4-19-04, the affiant met with the SOI and formulated a plan to make a controlled substance purchase from the above location. The SOI was searched for drugs and money, with negative results obtained. The SOI was then issued a sum of pre-recorded secret service funds with which to make an [sic] purchase, and then driven to the above location. Upon leaving the affiant, the SOI walked directly to the front entrance of the above location, whereupon entering the lobby and out of the affiant's sight, stayed for a short time. Upon exiting the building, the SOI returned directly to the affiant, turning over to the affiant a quantity of suspected cocaine, and stating that it had been

purchased from the above location, and the above described B/M. The SOI was once again searched for drugs and money with negative results.

The evidence was conveyed to the Narcotics Bureau analysis section where it [**6] was tested and found to contain cocaine by PO Dekun. The cocaine was placed into LSF N002889104.

During trial, Officer Eastman testified that the funds given to the informant were not pre-recorded funds. JA 258. During a pretrial hearing, Officer Michael Deacon (his name was misspelled as "Dekun" in the affidavit) testified that he performed a test on the substance purchased by the confidential informant which was positive for cocaine, but that this analysis was not performed in a laboratory. Defendant moved to suppress the warrant under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), arguing that two false statements in the warrant rendered it invalid. The district court denied the motion to suppress.

[*426] **HN1** Upon review of a "district court's ruling on a *Franks* challenge, we review de novo the district court's legal conclusions, and we review the district court's findings of fact for clear error." United States v. Keszthelyi, 308 F.3d 557, 566 (6th Cir. 2002). **HN2** The first step in the *Franks* analysis is to determine whether "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit[.]" Franks, 438 U.S. at 155-56. Mere [**7] inadvertence or negligence in making erroneous statements is insufficient to require exclusion. United States v. Elkins, 300 F.3d 638, 649 (6th Cir. 2002). If the affidavit is found to contain false statements knowingly or recklessly made, then the next step in the analysis is to determine "with the affidavit's false material set to one side," whether "the affidavit's remaining content is insufficient to establish probable cause[.]" Franks, 438 U.S. at 156. If the affidavit, minus any recklessly or intentionally made and materially false statements no longer establishes probable cause, then the court must hold the search warrant invalid. Franks, 438 U.S. at 156.

In regard to the reference to "pre-recorded" funds, Officer Eastman testified at trial that the funds used in this case were not pre-recorded, and that this was "just a common terminology used in each and every affidavit that I've ever done[.]" JA 258. Although the district court indicated its disapproval of the use of this language as boilerplate, the court never made a specific finding as to

whether the false statement was intentionally or recklessly included in the affidavit. Instead, the court concluded that use of the term [**8] "pre-recorded" was not material. The court noted that because there was no reference in the affidavit to any additional fact which would render the pre-recorded nature of the funds relevant, such as the discovery of pre-recorded funds on the premises, whether the funds used to purchase drugs were pre-recorded had no bearing on the existence of probable cause or the magistrate's determination. JA 1092-1093. This court agrees. Even assuming that the false description of the funds as "pre-recorded" was knowingly or recklessly made, the characterization of the funds as "pre-recorded" was not material to the magistrate's finding of probable cause in this case.

As to the reference to the "Narcotics Bureau analysis section," defendant argued that the term "analysis section" suggests a laboratory. Officer Deacon testified that he works in the Narcotics Prisoner Processing Unit. JA 312. Although he was not familiar with the term "analysis section," he stated that he does perform drug testing. JA 314. He testified that the chemicals he uses to test for the presence of a controlled substance are the same chemicals used in the lab, and that any distinction arises in testing for potency or purity. [**9] JA 314. He stated that he did perform the analysis in the instant case, which was positive for cocaine, and that he assigned the lock seal folder a number, as stated in the affidavit. JA 316.

The district court found that the reference to the "analysis section" was not included in the affidavit with the intent to mislead the magistrate concerning the nature of the drug test, but rather was an "inartful mischaracterization." JA 346-348. The court noted that the affidavit stated that the test was performed by Officer Deacon, with no indication that he was a chemist or lab technician. JA 346. The fact that the test was performed by a police officer suggests a field test rather than a laboratory analysis, and supports [**427] the district court's finding that the affiant had no intent to mislead the magistrate concerning where the test was conducted. With the exception of the use of the ambiguous term "analysis section," the other statements concerning the testing of the substance, including the fact that the test was positive for cocaine, were true and correct. We agree with the district court's conclusion that the reference to "analysis section" was not an intentional or material falsehood.

The [**10] district court also performed the second branch of the *Franks* analysis. The district court noted

the fact that the informant had worked with the police on numerous occasions and "had a track record which had been borne out." JA 1084. The court further noted that Officer Eastman searched the informant and found no drugs or money on his person before he entered the building, and that when he searched the informant on his return, he had cocaine but no funds. JA 1084. The court concluded that even disregarding the inaccurate statements in the affidavit, the warrant was still supported by probable cause. JA 1084-85, 1093-94.

HNS "To demonstrate probable cause to justify the issuance of a search warrant, an affidavit must contain facts that indicate a fair probability that evidence of a crime will be located on the premises of the proposed search." United States v. Frazier, 423 F.3d 526, 531 (6th Cir. 2005) (internal quotations and citation omitted). The affidavit in this case is based in large part on information provided by a confidential informant. In such a case, the court must consider the veracity, reliability, and basis of knowledge for that information as part of the totality of the circumstances [**11] for evaluating that information. United States v. Helton, 314 F.3d 812, 819 (6th Cir. 2003). However, "the affiant need only specify that the confidential informant has given accurate information in the past to qualify [the informant] as reliable." United States v. Greene, 250 F.3d 471, 480 (6th Cir. 2001).

The affidavit indicates that the informant was known to the affiant, and that he had worked with officers of the Narcotics Bureau on at least ten previous occasions, resulting in the arrests of at least ten persons and at least five convictions. This information was sufficient to establish the reliability of the informant. See United States v. Rodriguez-Suazo, 346 F.3d 637, 646 (6th Cir. 2003) (informant assisted law enforcement with information leading to more than three arrests and convictions); United States v. Williams, 224 F.3d 530, 532-33 (6th Cir. 2000) (finding a confidential informant reliable where the affidavit stated that the informant had provided information leading to "arrests and convictions").

The affidavit also states that Officer Eastman, an officer with seventeen years experience in the Narcotics Bureau, searched the informant with negative results, gave funds to [**12] the informant, and watched the informant enter the building at 2701 Chrysler. When the informant returned, he delivered a substance to the officer which tested positive for cocaine. The informant was searched again, and he had no cash or drugs on his person. The affidavit further states that the informant

told the officer that he had purchased the substance at Apartment Number 1721 from the individual described in the affidavit.

We agree with the district court that the facts contained in the affidavit are sufficient to establish probable cause even if the false statements are disregarded, and defendant's motion to suppress the warrant [*428] was properly denied.¹

II.

Defendant argues that his right to confront witnesses under the Sixth Amendment of the United States Constitution was violated when Officer Eastman was permitted to testify concerning information the police had received about there being a known shooter on the premises. HN4 We review the question of whether the admission of evidence violates the Confrontation Clause de novo. United States v. Stover, 474 F.3d 904, 912 (6th Cir. 2007).

HN5 The Confrontation Clause of the Sixth Amendment gives a criminal defendant the right to confront the witnesses against him and the opportunity to cross-examine such witnesses. Stewart v. Wolfenbarger, 468 F.3d 338, 347 (6th Cir. 2006). In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and [*14] the defendant ha[s] had a prior opportunity for cross-examination." Id. at 53-54. However, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 59 n. 9; see also United States v. Pugh, 405 F.3d 390, 399

¹ Defendant argues that the warrant must be held invalid because, if the magistrate had known that the affidavit contained false statements, he may have concluded that Officer Eastman was totally lacking in credibility and may have declined to issue the warrant, although there is no evidence that any of the other statements in the affidavit were false. This approach would be equivalent to holding that the mere presence of false statements is sufficient to invalidate the warrant. That is not the law. Rather, Franks also requires an [*13] independent analysis of the affidavit by the reviewing courts to determine if the facts in the affidavit, minus the false statements, are sufficient to establish probable cause. Franks, 438 U.S. at 156. It is only when probable cause is found lacking during this process that the warrant must be held defective. Id.

(6th Cir. 2005).

In this case, defense counsel cross-examined Officer Eastman concerning the short amount of time the police waited after knocking and announcing their presence before they broke down the door of the apartment. JA 270-273. On redirect, the prosecutor was permitted to ask Officer Eastman why the police entered the apartment so quickly, and Officer Eastman stated that "in our pre-raid debriefing, we had information from our SOI [that] there may have been a person on the premises who was deemed a shooter. And so for that fact, the safety of the raid, personnel was the greater consideration at that point." JA 284. He was then asked what he meant by "shooter," and he responded, "Someone who is known to have shot people ... in the past." JA 284. He explained that if the information was reliable, it meant that an increase in the time it took the officers to enter the apartment also [*15] raised the likelihood that they would receive fire from an individual on the inside. JA 284. After this testimony, the court instructed the jury:

In this case, you may use Officer Eastman's testimony to understand and evaluate the reasons why he went into-he and the other officers went into the door as quickly as they did.

In other words, you may use it in evaluating what was his state of mind at the time and what they knew at the time.

However, you may not use it for the truth of what was stated in these-in these statements.

In other words, that there was, in fact, a shooter in the apartment at any time previously, only as the evidence bears [*429] upon why the officers acted as they did. Okay? But not for the truth.

JA 285-86.

The record indicates that Officer Eastman's testimony concerning the information the police had received about a possible shooter was offered not for the truth of the matter asserted, but rather to explain, in response to the defense inquiries, why the police did not wait longer after announcing their presence before breaking down the door. See United States v. Chance, 306 F.3d 356, 385 (6th Cir. 2002) (HN6 "[W]here one party has 'opened the door' on an issue, the opponent, [*16] in the trial court's discretion, may introduce evidence on the same issue to rebut any false impression that may have been created by the earlier admission of evidence."). The trial court gave a cautionary instruction

to the jury which limited the jury's consideration of the evidence to that purpose. "Federal courts generally 'presume that juries follow their instructions.'" Hill v. Mitchell, 400 F.3d 308, 325 (6th Cir. 2005)(quoting Washington v. Hofbauer, 228 F.3d 689, 706 (6th Cir. 2000)).² Since the statement was not offered for the truth of the matter asserted, Officer Eastman's testimony did not violate the Confrontation Clause, and the trial court did not err in allowing this testimony.

III.

Defendant argues that the trial court erred in precluding defense counsel from cross-examining Officer Blanding concerning three prior incidents in which Officer Blanding discharged his weapon.³ The district court concluded that the proffered evidence was not admissible under Fed.R.Evid. 404(b). **[**17] HN7** This court reviews the district court's evidentiary rulings for an abuse of discretion. United States v. Ayoub, 498 F.3d 532, 547 (6th Cir. 2007). "A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." Schenck v. City of Hudson, 114 F.3d 590, 593 (6th Cir. 1997). The lower court's ruling will be reversed only if we are firmly convinced that a mistake has been made. Pugh, 405 F.3d at 397.

Fed.R.Evid. 404(b) provides in relevant part:

HN8 Evidence of other crimes, wrongs, **[**18]** or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or

² Even if the jury was tempted to ignore these instructions, there was no testimony identifying either defendant or any of the three females found in the apartment as the "shooter" referred to in the statement.

³ The first incident allegedly occurred in 1995 when Officer Blanding, while searching an abandoned building for squatters, shot at a pigeon that startled him. In 1997, Officer Blanding was off duty and standing outside a nightclub at 2:00 a.m. A man drove up to Officer Blanding and began firing, and Officer Blanding returned the fire, emptying his weapon. In 1998, Officer Blanding, again off duty, was withdrawing money from an ATM machine in a bank parking lot when a man opened his car door. Seeing an object in the man's hand and thinking that he was being robbed, Officer Blanding shot the man. JA 166-168.

absence of mistake or accident.

HN9 In determining the admissibility of evidence under Rule 404(b), the district court must apply a three-step analysis: (1) is there sufficient evidence that the other act in question actually occurred; (2) is the evidence of the other act probative of a material issue other than character; and **[**430]** (3) does the probative value of the evidence substantially outweigh its potential unfair prejudicial effect. United States v. Jenkins, 345 F.3d 928, 937 (6th Cir. 2003).

HN10 Under Rule 404(b), evidence of prior acts is not admissible to show criminal disposition or propensity. United States v. Lattner, 385 F.3d 947, 956 (6th Cir. 2004)(evidence of past criminal activity is inadmissible to show criminal propensity); United States v. Ushery, 968 F.2d 575, 580 (6th Cir. 1992) (Rule 404(b) bars evidence offered to show criminal disposition or propensity). Rule 404(b) applies to any person, and contemplates the prior act by another **[**19]** person being offered as exculpatory evidence by the defendant as "reverse 404(b) evidence." See United States v. Lucas, 357 F.3d 599, 605 (6th Cir. 2004). However, evidence of prior acts of a third party offered by a defendant is subject to the same strictures and analysis as Rule 404(b) evidence offered by the government. Id. at 605-06; see also United States v. Williams, 458 F.3d 312, 317 (3d Cir. 2006)(prohibition against propensity evidence applies to acts of a third party offered by a defendant).

Defendant argues that the proffered evidence was admissible under Rule 404(b) because it tended to show that Officer Blanding may have fired at defendant even though he did not see defendant with a gun, and that he lied about seeing defendant pull a weapon in order to shield himself from liability. Assuming *arguendo* that there was sufficient evidence that the other acts occurred, the district court correctly noted that the evidence of the prior incidents went to Officer Blanding's character, specifically, his propensity to "shoot first and think up an explanation later." JA 581. **HN11** A person's propensity to act in a certain way is not a ground for the admission of prior act evidence under Rule 404(b).

[20]** Insofar as defendant argued that the prior acts might bear on Officer Blanding's credibility, the reference to "motive" in Rule 404(b) does not refer to a motive to testify falsely. See United States v. Black, 28 F.3d 1214 (table), 1994 U.S. App. LEXIS 16878, 1994 WL 325992 at *2 (6th Cir. July 5, 1994)(Rule 404(b) does not pertain to evidence on the issue of credibility); United States v. Farmer, 923 F.2d 1557, 1567 (11th Cir.

1991)(the word "motive" as used in Rule 404(b) does not refer to a motive to testify falsely). See also, United States v. Taylor, 417 F.3d 1176, 1180 (11th Cir. 2005) (holding that trial court properly disallowed evidence of citizen complaints of alleged racial harassment, brutality and evidence planting against officer to show that officer had a motive to frame the defendant and lie at trial; "motive" in Rule 404(b) context does not refer to witness's motive to testify falsely). The district court correctly held that the proffered evidence was not admissible under Rule 404(b).

The district court was also concerned about the danger of confusion which would arise by "having a parade of witnesses ... testifying about acts not directly related to the case against defendant, that "the jury could [**21] easily be misled and confused and that this would be not only confusing to the jury, but would be very prejudicial to the government's case." JA 582-83. HN12 Under Fed.R.Evid. 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed.R.Evid. 403. The district court has broad discretion in determining whether the danger of unfair prejudice outweighs the probative value of the evidence. United States v. Mack, 258 F.3d 548, 555 (6th Cir. 2001). The district court did not abuse its discretion in holding that even if the evidence was admissible, its probative value was substantially outweighed by the [**431] danger of jury confusion and unfair prejudice to the government. ⁴

Defendant claims that the inability to cross-examine Officer Blanding concerning the prior shootings denied defendant his Fifth Amendment right to present evidence in his defense and his Sixth Amendment right to cross-examine his accusers. However, HN13 "a complete defense does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." Lucas, 357 F.3d at 606. Since the proffered evidence was not admissible under Rule 404(b), defendant's Fifth Amendment challenge fails.

⁴In correlation with prohibiting inquiry into the prior shooting incidents involving Officer Blanding, the district court, to defendant's benefit, also denied the government's request to delve into the defendant's alleged tendency to brandish a weapon when confronted by the police, and struck the brandishing element from the § 924(c) count, thereby reducing the potential penalty on that count. JA 582-84; 1125. [**22] These additional rulings are not at issue in this appeal, and we express no opinion as to whether they were correct.

Likewise, HN14 "not all limitations on cross-examination have constitutional implications" and courts are accorded broad discretion in limiting cross-examination. Wright v. Dallman, 999 F.2d 174, 179 (6th Cir. 1993); see also, Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ("[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only [**23] marginally relevant."). "Limitations on specific inquiries by the defense are permissible so long as 'the jury has sufficient other information upon which it may make a discriminating appraisal of the witness's motives and bias.'" Dallman, 999 F.2d at 179 (quoting United States v. Baker, 494 F.2d 1262, 1267 (6th Cir. 1974)). Here, defense counsel thoroughly cross-examined Officer Blanding concerning his encounter with the defendant. Officer Blanding was asked if he could have been mistaken under the pressures of the situation about seeing a gun in defendant's hand. JA 527. Officer Blanding acknowledged that if he admitted that defendant did not have a gun, this would expose him to civil liability and criminal prosecution. JA 528-29. He was questioned about whether he could make a mistake about someone having a gun. JA 530. The exclusion of evidence of the prior shootings did not prevent the jury from appraising Officer Blanding's motive and credibility, and the trial court's ruling did not infringe upon the defendant's right to confront witnesses under the Sixth Amendment.

IV.

Defendant argues that the court erred in admitting medical records which indicated that defendant had cocaine [**24] in his system at the time he was arrested. Defendant argues that this evidence was not relevant to the issue of whether he acted in an aggressive manner during the raid.

HN15 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Defendant does not contend that the issue of whether he acted aggressively was not "of consequence to the determination of the action[.]" Evidence that the defendant acted aggressively supported Officer Blanding's testimony that defendant pulled a gun, which in turn was relevant to prove that defendant used or carried a firearm during

[*432] and in relation to a drug trafficking offense, as alleged in Count 4, and possessed a firearm, as alleged in Count Six. Rather, defendant argues that the district court erred in determining that the presence of cocaine in defendant's system made it more probable that the defendant acted aggressively.

Sergeant Joseph Harris testified that he had been a police officer for nineteen years. JA 614. Based on Sergeant Harris's experience in narcotics investigations with [**25] the Detroit Police Department and the Drug Enforcement Agency, the district court found that he could testify as an expert concerning narcotics trafficking. JA 619-22. Sergeant Harris testified that he had purchased drugs approximately five hundred times. JA 625. He further stated, based on his experience, that crack cocaine dealers sometimes use cocaine, and that he had often seen persons under the influence of cocaine. JA 669-70. Sergeant Harris testified that persons under the influence of cocaine are "[h]ard to contain, don't follow directions. Strong, very combative." JA 671. He also stated that persons under the influence of cocaine are very aggressive, and will not follow orders due to their combative nature. JA 672. The district court noted this testimony and concluded that the fact that defendant was under the influence of cocaine went to the defense theory that defendant did not respond aggressively with a gun. JA 967.

The medical records satisfy the requirements for relevant evidence. In light of Sergeant Harris's testimony that cocaine users act aggressively, the medical records stating that defendant had cocaine in his system at the time of his arrest made it more probable [**26] than it would have been without that evidence that he acted aggressively by pulling a firearm. Defendant notes that the records failed to indicate the concentration of cocaine in defendant's system, but this goes to the weight to be given the evidence, not to its admissibility. See *Moross Ltd. Partnership v. Eckenstein Capital, Inc.*, 466 F.3d 508, 516 (6th Cir. 2006) (HN16 weakness in factual basis for expert opinion goes to weight of evidence rather than admissibility). The district court did not abuse its discretion in admitting this evidence.

V.

Defendant argues that the prosecution failed to disclose evidence prior to trial in violation of *Fed.R.Crim.P. 16* and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). During trial, defendant moved for a mistrial due to the government's alleged failure to disclose certain evidence prior to trial, specifically: (1) a

fingerprint analysis of a print identified as belonging to a co-defendant; (2) the shirt worn by defendant at the time he was shot; and (3) the falsity of the statement in the warrant affidavit that the funds used by the confidential informant were pre-recorded funds. The court denied the motion for a mistrial. JA 598-613. Defendant repeated [**27] these arguments in a motion for a new trial made prior to sentencing. JA 176-177. The trial court also denied the motion for a new trial. JA 1105.

HN17 We review a district court's decisions under *Rule 16*, as well as the denial of a mistrial due to delayed disclosure of evidence, for abuse of discretion. *United States v. Davis*, 306 F.3d 398, 420 (6th Cir. 2002); *United States v. Quinn*, 230 F.3d 862, 866 (6th Cir. 2000). **HN18** The district court's determination as to the existence of a *Brady* violation is reviewed de novo. *United States v. Graham*, 484 F.3d 413, 416-17 (6th Cir. 1998). For the following reasons, we conclude that defendant was not denied a fair trial.

[*433] **HN19** *Rule 16* provides that the government, upon request by a defendant, must permit the defendant to inspect and to copy or photograph papers or tangible objects "if the item is within the government's possession, custody, or control" and is material to preparing the defense, intended for use in the government's case in chief, or belongs to the defendant. *Fed.R.Crim.P. 16(a)(1)(E)*. *Rule 16* also provides that the government must permit defendant to inspect and copy or photograph the results or reports of any scientific test if: (1) the item [**28] is within the government's possession, custody, or control; (2) counsel for the government knows or should have known of the item's existence through the exercise of due diligence; and (3) the item is either material to the preparation of the defendant or intended for use during the government's case in chief. *Fed.R.Crim.P. 16(a)(1)(F)*.

HN20 If the trial court finds that a violation of *Rule 16* has occurred, the court may impose a number of sanctions, including entering an order mandating discovery or inspection, granting a continuance, excluding the undisclosed evidence, or granting any other remedy "that is just under the circumstances." *Fed.R.Crim.P. 16(d)(2)*. In deciding the appropriate remedy, the court considers: (1) the reasons for any delay in producing materials, including ill intent or bad faith; (2) the degree of prejudice, if any, to the defendant; and (3) whether any prejudice may be cured with a less severe course of action like a continuance or a recess. *United States v. Maples*, 60 F.3d 244, 247

(6th Cir. 1995).

The Supreme Court held in *Brady* that **HN21** "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is ****29** material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, 373 U.S. at 87*. To establish a *Brady* violation, the defendant must show that: (1) the evidence must be favorable to the defendant because of its exculpatory or impeaching nature; (2) the evidence was willfully or inadvertently suppressed by the government; and (3) the defendant was prejudiced. *Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*. Evidence "is material" if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id. at 280* (quoting *United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*). Evidence is favorable to the defendant if it exculpates the defendant or enables the defendant to impeach witnesses. *Bagley, 473 U.S. at 676*.

In this case, the evidence noted by defendant was disclosed during the course of the trial. **HN22** "*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose." *United States v. Bencs, 28 F.3d 555, 560-61 (6th Cir. 1994)*. Delay only violates *Brady* when the delay itself causes prejudice. *United States v. Blood, 435 F.3d 612, 627 (6th Cir. 2006)*.

A.

The ****30** first alleged violation relates to the results of a fingerprint analysis. On the first day of trial, prior to opening statements, counsel for the government informed the court that he had just spoken with the lab on the phone, and was informed that the lab had identified the fingerprint of co-defendant Bianca Shelman. The prosecutor did not know on what piece of evidence the print had been found or the quality of the print, and he told the lab to fax the report to chambers. JA 356. Since the parties had not yet seen the ****434** report, the court instructed counsel not to mention it during opening statements. JA 357. In arguing the mistrial motion, defense counsel expressed no problem with the fingerprint analysis itself because counsel viewed that evidence as being exculpatory to the defendant, but counsel argued that defendant was prejudiced because counsel was not able to refer to this evidence during the opening statements. JA 603-07.

The district court concluded that the defendant failed to show prejudice because the ability to use the fingerprint evidence during trial was more effective than an opening statement, which was not evidence. JA 613.

No violation under *Rule 16* or *Brady* occurred ****31** in regard to the fingerprint analysis. The district court noted that the analysis was completed right before the trial began. JA 1069-1070. Defense counsel also stated that "the fingerprint analysis, apparently, did not take place until one business day before trial began." JA 603. There is no evidence that the results of the analysis were in the possession, custody or control of the government prior to trial. Thus, the failure to provide the report of the analysis to defendant prior to trial did not violate *Rule 16*. Likewise, **HN23** "*Brady* and its progeny have recognized a duty on the part of the prosecutor to disclose material evidence that is favorable to the defendant over which the prosecution team has control." *Graham, 484 F.3d at 417*. *Brady* does not impose a duty upon the government to discover information which it does not possess. *Id.*

In any event, defendant has not shown prejudice due to the delay in disclosure, since he was able to take advantage of the exculpatory fingerprint evidence at trial. Detective Sergeant Charles Morden testified that a fingerprint belonging to Bianca Shelman was found on a plastic bag, and stated on cross-examination that no other identifiable fingerprints ****32** were found. JA 821, 832. Defense counsel argued during closing that no fingerprint evidence linked defendant to the drug evidence found at the scene. JA 1030. Defendant has shown no prejudice from the fact that counsel was unable to refer to this evidence during opening statement.

B.

The second alleged violation concerns the government's failure to turn over the shirt defendant was wearing when he was shot. This evidence was subject to disclosure under *Rule 16*. However, there is no evidence that the government intentionally failed to disclose this evidence to the defendant in violation of *Rule 16*. The district court noted that it was not clear that the shirt was not made available at the original production of evidence. JA 1079. The prosecutor indicated that he did not recall defense counsel asking for the shirt, and stated that "had I known that's something they want, of course, we give it over." JA 608-9. During trial, the court ordered the government to turn the shirt over to defense counsel, and the

government complied. JA 609.

Since the shirt in question was the defendant's property, the defense also knew or had reason to know that this evidence existed. HN24 "[T]here is no *Brady* violation [**33] if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question[.]" Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000). If the defendant wanted to arrange for an expert analysis of the shirt prior to trial, he could have petitioned the government and the court for the production of the shirt for testing.

In addition, defendant has not shown how he was prejudiced by the failure to produce the shirt sooner. In denying defendant's motion for a new trial, the district [**435] court noted there was no indication that the shirt was exculpatory evidence. JA 1079. Defendant argued that the shirt was relevant to the issue of whether he was shot on his right side, as Officer Blanding testified, or his left side, the location of his colostomy bag. JA 500, 502. Officer Blanding testified that the gun was on defendant's left side, but agreed that no blood could be seen on the gun in the photograph produced at trial. JA 506-7. Defendant's theory was that if he was shot in his left side and the gun was located on his left side, there should have been blood on the firearm as a result of the gunshot wound. However, the record is silent as to what [**34] evidence, if any, the shirt would reveal on those issues. Other evidence showed that the shotgun shell used to shoot defendant contained approximately nine pellets. JA 459. The defendant's hospital records showed one pellet wound on the left side, with the remainder being in the center and right side of defendant's abdomen. JA 580. Therefore, defendant has not shown that the shirt would have supported his theories.

The district court also noted that defense counsel had the opportunity to inspect the shirt during trial, but decided not to use it, that the shirt was made available to defense counsel in sufficient time to obtain an analysis of the shirt by a forensic expert, and that defense counsel made no request for a continuance for that purpose. JA 1075-80. In light of defendant's failure to request a continuance to obtain an expert examination of the shirt, no prejudice has been shown. See O'Hara v. Brigano, 499 F.3d 492, 503 (6th Cir. 2007) (noting defendant's failure to request a continuance to prepare a defense or subpoena supporting evidence); United States v. Holloway, 740 F.2d 1373, 1381 (6th Cir. 1984) (declining to find prejudice in light of defense counsel's failure to request

[**35] a continuance).

C.

The third alleged violation is the failure to disclose prior to trial that the description "pre-recorded" funds was false. This fact was revealed at trial through the cross-examination of Officer Eastman. No Rule 16 violation occurred, because the government was not required under Rule 16 to disclose the anticipated statements of witnesses prior to trial. See Fed.R.Crim.P. 16(a)(2)(HN25) Rule 16 does not "authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500"; 18 U.S.C. §3500(a) (no statement made by a government witness other than the defendant shall be subject to discovery or inspection "until said witness has testified on direct examination in the trial of the case.").

Likewise, HN26 pretrial disclosure of exculpatory or impeachment evidence is not necessarily required under *Brady*. "As a general proposition, '[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one....'" United States v. Mullins, 22 F.3d 1365, 1371 (6th Cir. 1994) (quoting Weatherford v. Bursey, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)). "Where a defendant claims a violation of *Brady* because of the Government's [**36] failure to produce impeachment evidence, 'so long as the defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, we fail to see how the Constitution is violated.'" United States v. Crayton, 357 F.3d 560, 569 (6th Cir. 2004) (quoting United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988)).

Defense counsel thoroughly cross-examined Officer Eastman concerning his erroneous statement in the warrant affidavit [**436] that the funds used were pre-recorded. JA 257-263. Defense counsel noted the false statement during closing argument. JA 1013-14. Thus, defendant was able to make use of any impeachment value to be had from that evidence. Likewise, the disclosure of this evidence during trial did not prejudice defendant's position regarding his motion to the suppress the search. As noted previously, the district court correctly determined that the fact that pre-recorded funds were not used was not material to the issuance of the search warrant. Defendant has not shown that he was prejudiced by the disclosure of the false statement in the affidavit during trial.

VI.

Defendant argues that he was denied a fair trial due to prosecutorial misconduct. **[**37]** *HN27* We review the question of whether prosecutorial misconduct requires reversal de novo. *Stover*, 474 F.3d at 914. This court's review of a prosecutorial misconduct claim involves a two-step analysis: (1) were the prosecutor's remarks improper; and (2) were the remarks sufficiently flagrant to warrant reversal. *United States v. Jamieson*, 427 F.3d 394, 413 (6th Cir. 2005). In determining whether the conduct was "flagrant," we consider four factors: (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused. *Blood*, 435 F.3d at 628. "In examining prosecutorial misconduct, it is necessary to view the conduct at issue within the context of the trial as a whole." *United States v. Beverly*, 369 F.3d 516, 543 (6th Cir. 2004).

Defendant first argues that counsel for the government acted improperly in identifying the confidential informant and co-defendant Hoyle as witnesses.

Prior to opening statements, the government stated that, contrary to its earlier representations, it would be calling the confidential **[**38]** informant as a witness. JA 598-99. Defense counsel objected about the lack of time to prepare, and the court ordered the government to provide defense counsel with the informant's files. The court also indicated that it probably would not permit the informant to testify due to the delay in identifying the informant as a witness. JA 602. The government subsequently decided not to turn over the files, and did not call the informant as a witness. JA 599.

The gist of defendant's argument is that the government's decision to call the informant as a witness deprived his counsel of the opportunity to comment during opening statements that the government "supposedly has a key witness that can point the finger at" the defendant, but that "the government's afraid to call that witness." JA 600-01. However, the government's subsequent decision not to call the informant as a witness did not constitute misconduct. Further, during closing argument, defense counsel was able to comment on the fact that the government had not called the confidential informant as a witness, stating, "They have no confidential informant that they could bring in and say Mr. Robinson sold me drugs." JA 1023. Therefore, defendant **[**39]** can show no

prejudice from the prosecutor's actions.

The defendant also contends that the prosecutor engaged in misconduct when he included Hoyle on his list of potential witnesses read to the prospective jurors during voir dire, see JA 351, but did not call her as a witness during trial. Defendant contends that the government included Hoyle on its witness list to make its case look stronger and to intimidate defendant **[*437]** into pleading guilty. The record does not support this contention. Defense counsel argued before the district court that they knew from speaking with Hoyle's attorney that she had no intention of pleading guilty. JA 1072-73. However, the district court responded that if Hoyle was considering cooperating with the government, her attorney would not be likely to reveal that information to defendant's counsel. JA 1073. The court further observed that Hoyle was still engaged in plea negotiations with the government at that time, and that there was always a chance that Hoyle would change her mind and decide to cooperate. JA 1072-74.

Defendant cites no authority for the proposition that the prosecution is obliged to call each and every potential witness identified during voir **[**40]** dire, and the government did not engage in misconduct by including Hoyle's name in the list of potential witnesses read to the jury. As the district court commented, if the government had failed to identify Hoyle as a witness and she later decided to testify, defense counsel would have objected to the government's failure to give the prospective jurors the opportunity to say that they knew Hoyle. JA 1074. In addition, defense counsel commented during closing argument concerning the government's failure to call any co-defendants as witnesses, stating, "They have no co-defendants, cooperators, who's [sic] are going to come in and say Mr. Robinson was a part of the criminal conspiracy and he's guilty." JA 1023. Defendant has shown no prejudice from the inclusion of Hoyle's name in the government's list of potential witnesses.

Defendant also argues that the prosecutor engaged in misconduct when he asked defense counsel in front of the jury whether counsel was willing to stipulate to defendant's medical records, knowing that defense counsel had previously objected to the release of the medical records on the grounds of physician-patient privilege. JA 575-580; 666. Defense counsel responded **[**41]** that they were not going to stipulate to the admission of the records. JA 666. The district court noted that the prosecutor should not have assumed that there might be a stipulation, but rejected defendant's

argument that the prosecutor acted with ill will or that he had requested the stipulation hoping to create the impression that the defense was hiding the records. JA 795-97; 799; 801.

While it may have been more appropriate for the prosecutor to request a side bar conference to discuss the stipulation, his actions did not rise to the level of misconduct. The remark was isolated and, as the trial court noted, JA 797, it was not sufficient to raise an implication that the defense was trying to hide the records. Defendant declined the district court's offer for a curative instruction. JA 798-99. Finally, the evidence against defendant was strong.

We conclude that defendant was not denied a fair trial due to the actions of the prosecutor discussed above.

VII.

Finally, defendant argues that he is entitled to a new trial due to the alleged cumulative errors committed during trial. However, HN28 the accumulation of non-errors cannot collectively amount to a violation of due process. Campbell v. United States, 364 F.3d 727, 736 (6th Cir. 2004). [****42**] Since we have found no error in the proceedings below, this argument is without merit.

VIII.

For the foregoing reasons, we affirm the defendant's convictions.

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Dear Counsel and Clerk:

Attached, for filing, is the State's Supplemental Brief in *State v. Salgado-Mendoza*, No. 93293-0.

Please contact me if you should experience any difficulties in opening the document.

Sincerely,

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