Affirmed and Opinion filed March 23, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01132-CR

ABEL LIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 779,027

O P I N I O N

Appellant, Abel Liguez, files this appeal challenging the trial court's actions below. Liguez was convicted by a jury of possession with intent to deliver cocaine weighing at least 400 grams.[1] Following his conviction, the jury sentenced him to 30 years confinement in the Texas Department of Criminal Justice, Institutional Division, and a $50,000 fine. Liguez appeals alleging in three points of error: (1) the State denied him due process by failing to disclose impeachment evidence; (2) the trial court abused its discretion by failing to disclose

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[1] The jury also made an affirmative finding of the use of a deadly weapon because upon entering Liguez's bedroom, police found Liguez with a gun in his hands.

the identity of an informant; and (3) the trial court abused its discretion by admitting scientific testimony without requiring the State to lay the proper predicate before the jury. We affirm.

I.
Factual Background

Police agents conducted a controlled buy of cocaine from Liguez. Liguez sold cocaine to a confidential informant, and based on the evidence of that sale, a search warrant was issued and executed at Liguez's residence. Pursuant to this lawful search, the police discovered 487.5 grams of cocaine in Liguez's bedroom. At a hearing on Liguez's motion to suppress, Liguez requested disclosure of the confidential informant's identity, which was denied.

II.
Impeachment Evidence

In his first point of error, Liguez asserts the State withheld impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed.2d 215 (1963) and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L. Ed.2d 481 (1985). At the outset, we note that under the *Brady* decision, a prosecutor has an affirmative duty to turn over material, exculpatory evidence. *See Ex parte Kimes*, 872 S.W.2d 700, 702 (Tex. Crim. App. .1993) (citing *Bagley*, 473 U.S. at 676, 105 at 3380, 87 L. Ed.2d at 490). Impeachment evidence is considered to be favorable to the accused and is, therefore, subject to the mandatory disclosure dictates of *Brady*. *See Etheridge v. State*, 903 S.W.2d 1, 20 (Tex .Crim. .App.1994), *cert. denied*, 516 U.S. 920, 116 S.Ct. 314, 133 L. Ed.2d 217 (1995).

However, failure to disclose impeachment evidence will only result in a constitutional violation if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See id*. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *See Kimes*, 872 S.W.2d at 702. Thus, a due process violation has occurred if: (1) the

prosecutor failed to disclose evidence; 2) the evidence is favorable to the defendant; and (3) the evidence is material. *See id*. However, the duty to turn over all material, exculpatory evidence does not create a duty to turn over evidence that would be inadmissible at trial. *See Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App.), *cert. denied*, 118 S. Ct. 305, 139 L.Ed.2d 235 (1997). Thus, specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be inquired into on cross-examination nor proved by extrinsic evidence. *See* TEX. R. EVID. 608(b).

Liguez complains that the police officer who arranged for the confidential informant to buy drugs from Liguez and executed the search warrant had previously been reprimanded in another case concerning his inadvertent destruction of cocaine evidence before it was analyzed by the crime lab. This is significant, Liguez asserts, because the cocaine retrieved from Liguez's house was given to Officer Winkler. Officer Winkler placed the cocaine in the locked trunk of his car, and then proceeded to another location where he assisted another officer executing an unrelated search warrant. Officer Winkler placed the narcotics retrieved from the subsequent search in the front seat of his car. Liguez argues that the possibility of Officer Winkler commingling the drugs from the two searches is great; therefore, the letter reprimanding Officer Winkler is important for impeachment purposes.

It is manifest that this evidence was not admissible at trial pursuant to Rule 608(b). *See Lagrone*, 942 S.W.2d at 615. Thus, the prosecutor was under no duty to disclose it. *See id*. A determination that the document in question would not have been admissible in evidence is dispositive of a *Brady* issue. *See Dalbosco v. State*, 978 S.W.2d 236, 239 (Tex. App.—Texarkana 1998, pet. ref'd). However, a reviewing court should nevertheless address whether reversal would be required even if this evidence had been admissible. *See id*.; *see also Lagrone*, 942 S.W.2d at 615 (holding that prosecutor has no duty to turn over evidence that would be inadmissible at trial, but also determining whether, if evidence had been admissible, appellant established reversible error). Therefore, we shall address the question of whether reversal would be required if this evidence would have been admissible.

Regarding the elements of a *Brady* violation, it is undisputed here that the State failed to disclose the letter of reprimand regarding Officer Winkler to the appellant, but under *Lagrone*, the prosecutor had no duty to disclose. Second, we determine whether the evidence can be viewed as favorable to the accused. Favorable evidence is any evidence, including exculpatory and impeachment evidence, that, if disclosed and used effectively, may make the difference between conviction and acquittal. *See Saldivar v. State*, 980 S.W.2d 475, 486 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). The evidence in the letter regarding Officer Winkler could be used to impeach his testimony concerning the post-arrest handling of the cocaine retrieved from appellant's residence. As potential impeachment evidence, the letter was favorable to appellant.

The third requirement of the *Brady* analysis is that the evidence must be material. Evidence is material if it creates a probability sufficient to undermine the confidence in the outcome of the proceeding. *See id.* A reviewing court determines materiality by examining the alleged error in the context of the entire record and in the context of the overall strength of the State's case. *See id.* The determination of materiality under the standard *Brady* analysis requires an examination of the probable impact the suppressed evidence would have had on the outcome of the trial in light of all the other evidence. *See State v. DeLeon*, 971 S.W.2d 701, 705 n. 9 (Tex. App.—Amarillo 1998, no pet.). We will examine the issue of materiality in light of appellant's contention in his brief under point of error one, that had the letter of reprimand been available to the defense, it would have impeached Officer Winkler's testimony and supported an instruction on the lesser included offense of possession of cocaine in an amount between 200 and 400 grams.

III.
Jury Charge on Lesser Included Offense

Appellant was indicted for the offense of possession of not less than 400 grams of cocaine with the intent to deliver. Possession of cocaine[2] with the intent to deliver is an offense under Section 481.115 of the Texas Controlled Substances Act. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115 (Vernon Supp. 2000). Under Subsection (f), possession of more than 400 grams is punishable by imprisonment for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000. *See id.*, § 481.115(f). If the offense involves the possession of 200 grams or more of cocaine, but less than 400 grams, the offense is a first degree felony. *See id.*, § 481.115(e). First degree felonies in this State are punishable by imprisonment for life or for any term of not more than 99 years or less than 5 years. *See* TEX. PEN. CODE ANN. § 12.32(a) (Vernon 1994).

The letter appellant now asserts was material to his defense is a June 1989 letter from Lee Brown, Chief of Police, to Officer Winkler. The letter states that Winkler had conducted a narcotics investigation where he purchased .4 grams of cocaine from two suspects. When he returned to the station to process the evidence and complete the paper work, he was assisted by two other officers. During this process, the officers duplicated the envelope which was to contain the narcotics. When they realized this duplication, they unknowingly destroyed the envelope which contained the cocaine and submitted an empty envelope to the crime lab for analysis. For this unknowing conduct, which constituted a violation of one of the General Orders, Officer Winkler was reprimanded.

A defendant is entitled to an instruction on a lesser included offense where there is some evidence directly germane to a lesser included offense for the factfinder to consider. *See Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *See id.* at 23. If a defendant either presents evidence that he committed no offense or *presents no evidence*,

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[2] Under § 481.115(a) it is an offense to possess with the intent to deliver a controlled substance listed in "Penalty Group I." Health & Safety Code section 481.102 defines Penalty Group I as including cocaine. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.102(3)(D) (Vernon Supp. 2000).

and there is no evidence otherwise showing he is guilty only of a lesser included offense, then a charge on a lesser included offense is not required. See id. at 24. (emphasis added)

We hold the letter of reprimand sent to Officer Winkler would, if introduced at trial, not have warranted a charge on the lesser offense of possession of more than 200 grams but less than 400 grams of cocaine. Officer Winkler testified that he recovered numerous bags of cocaine at the house where appellant was arrested. When he returned to his office, he and Officer Gideon completed an inventory of the evidence and placed it in an evidence envelope. The cocaine evidence that went into the evidence envelope was described by Officer Winkler as follows:

> Seven plastic bags with a white powder weighing approximately 403.7 grams.
> One hundred twenty-four plastic bags weighing approximately 66.1 grams.
> Twenty-six small plastic bags weighing approximately 69.1 grams.

Other items of evidence were added to the bag, and then it was sealed by Officer Winkler. In addition, James Price, a chemist, testified for the State that the total weight of the cocaine delivered to him weighed approximately 487.5 grams.

Appellant offered no evidence to contradict the testimony of Officer Winkler. Moreover, the reprimand letter to Officer Winkler does not constitute evidence of a smaller quantity of cocaine than that testified to by Winkler and Price. Viewing all of the evidence in this proceeding, including the undisclosed reprimand letter, there is no evidence showing that appellant is guilty only of a lesser included offense; thus, no charge on a lesser included offense would have been required. *See id.* We must conclude, therefore, that the letter was not material for impeachment purposes because it would not have had any impact on the outcome of the trial. *See Leon*, 971S.W.2d at 705. The fact that Winkler had been reprimanded for an unknowing destruction of 100 percent of the contraband in a proceeding nine years earlier does not create a probability, sufficient to undermine the confidence in the outcome of the proceeding, that he commingled the cocaine from two arrests here and inadvertently increased the amount of cocaine in appellant's evidence envelope. Simply

stated, because the reprimand letter was immaterial to the outcome of the proceeding, appellant was not denied due process. Accordingly, we overrule point of error one.

IV.
Confidential Informant

In Liguez's second point of error, he contends the trial court abused its discretion by failing to require the disclosure of the identity of a confidential informant. An informant's identity should be revealed when the testimony of the informant is necessary to a fair determination of the issues of guilt or innocence of the accused. *See* TEX. R. EVID. 508(c)(2); *see also Bodin v. State*, 807 S.W.2d 313, 317-18 (Tex. Crim. App.1991). Before revealing the informant's identity, the informer's potential testimony must significantly aid appellant, and mere conjecture or supposition about possible relevance is insufficient. Appellant has the burden of demonstrating that the informant's identity must be disclosed. *See Abdel-Sater v. State*, 852 S.W.2d 671, 673-74(Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Appellant must make a plausible showing of how the informer's information may be important. *See id*. This court must consider all of the circumstances of the case to determine if the trial court erred by not requiring the State to disclose the informer's identity. *See Edwards v. State*, 813 S.W.2d 572, 580 (Tex. App.—Dallas 1991, pet. ref'd).

The confidential informant used in this case bought cocaine in a controlled buy the day before Liguez was arrested for possession of cocaine. This buy provided the probable cause on which the search warrant was based. However, the informant was not present when the search warrant was executed or the narcotics seized. When the informant is not present when a search warrant is executed and the informant does not participate in the offense for which the defendant is charged, the identity of the informant does not need to be disclosed because the informant's testimony is not essential to a fair determination of guilt. *See Washington v. State*, 902 S.W.2d 649, 657 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *see also Abdel-Slater*, 852 S.W.2d at 674. Here, because the informant was not present when the warrant was executed, the identity of the informant need not be disclosed.

Therefore, the trial court did not abuse its discretion by refusing to order the disclosure of the informant's identity. We overrule Liguez's second point of error.

V.
Scientific Testimony

In his third point of error, Liguez complains the trial court abused its discretion by admitting scientific testimony without requiring the witness to lay the predicate before the jury.[3] The scientific testimony here concerned the tests conducted by the Houston Police Department to determine the chemical composition and strength of the controlled substance retrieved from Liguez's residence.

To be considered reliable, and thus admissible, evidence based on scientific theory must satisfy three specific criteria pertaining to its validity and application: (a) the underlying scientific theory must be valid; (b) the technique [or method] applying the theory must be valid; and (c) the technique [or method] must have been properly applied on the occasion in question. *See Kelly v. State*, 824 S.W.2d 568, 573(Tex. Crim. App. 1992). All three of these criteria must be proved to the trial court by clear and convincing evidence, outside the presence of the jury, before the evidence may be admitted. *See Kelly*, 824 S.W.2d at 573.[4]

The Court of Criminal Appeals has recognized the following non-exclusive list of factors which could affect a court's determination of reliability: 1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such community can be ascertained; 2) the existence of literature supporting or rejecting the underlying scientific theory and technique; 3) the clarity with which the underlying scientific theory and technique can be explained to the court; 4) the potential rate

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[3] Appellant's argument is based on Evidence Rule 702 which provides, in part, as follows: "If Scientific, technical or other specialized knowledge will assist the *trier of fact* to understand the evidence or determine a fact issue, ..." TEX. R. EVID. 702. (emphasis added)

[4] Relevancy is the proper standard for determining admissibility of scientific testimony. *See Kelly*, 824 at 573. This standard applies to all scientific testimony. *See Hartman v. State*, 946 S.W.2d 60, 63 (Tex. Crim. App. 1997). The trial judge as gatekeeper is to determine the reliability, relevancy, and admissibility of scientific evidence. *See id.*

of error of the technique; 5) the availability of other experts to test and evaluate the technique; 6) the qualifications of the expert(s) testifying; and 7) the experience and skill of the person(s) who applied the technique on the occasion in question. *See Emerson v. State*, 880 S.W.2d 759, 763-64 (Tex. Crim. App. 1994).

Here, HPD crime lab chemist James Price and his supervisor Claudia Busby testified to the three *Kelly* criteria necessary for the admission of the scientific tests used by Price in this case. Because Price was unable to adequately explain the theories underlying the tests used, Busby's testimony was necessary to lay the proper predicate, and she testified outside the presence of the jury. Her testimony also helped to provide the court with other information helpful to its determination of reliability of the evidence, namely the qualifications of Price, as well as his experience and skill in applying the technique in this case. Based on the testimony proffered by the State, the trial judge admitted the evidence of the tests.

There is no requirement in Rule 702 that once the predicate is laid for the trial judge and the evidence deemed admissible, that the predicate be presented again in the presence of the jury. In fact, the case law seems to assume otherwise. *See Campbell v. State*, 910 S.W.2d 475 (Tex. Crim. App. 1995) (holding proponent of scientific evidence must prove to trial judge, by clear and convincing evidence and *outside presence of jury*, that proffered evidence is reliable and therefore relevant); *see also Kelly*, 824 S.W.2d at 573 (holding all three of these criteria must be proved to the trial court by clear and convincing evidence, *outside the presence of the jury*) (emphasis added). The validity of the theories underlying the scientific evidence offered in this case pertained to the reliability, and thus the admissibility of the evidence. Because the admissibility of evidence is a matter for the trial judge to determine, the trial court did not err by admitting the evidence without requiring a second, and superfluous, predicate to be laid in the presence of the jury. Accordingly, we overrule Liguez's third and final point of error.

We affirm the judgment of the trial court.

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John S. Anderson
Justice

Judgment rendered and Opinion filed March 23, 2000.

Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.

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