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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RUDOLPH FARROW, Defendant and Appellant.	B269790 (Los Angeles County Super. Ct. No. TA137397)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Modified and affirmed with directions.

Greg Demirchyan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant

Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant, Rudolph Farrow, was convicted of unlawfully driving or taking a vehicle and counterfeiting the state seal. (Veh. Code, § 10851, subd. (a); Pen. Code, § 472.) He was sentenced to county jail for three years eight months. We reject defendant's claim that the prosecutor failed to disclose exculpatory evidence (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*)) but correct defendant's custody credit.

THE EVIDENCE

The Crimes

Timothy Redmond was working as a security guard at a well-lit checkpoint of a shipyard. Defendant, wearing a baseball cap, drove up to the checkpoint in a stolen truck. Defendant handed Redmond what appeared to be a driver's license. Redmond got a good look at defendant's face. Defendant matched the photograph on the license.

Pursuant to protocol, Redmond took a photograph of defendant's driver's license. Because Redmond did not recognize defendant as someone who had been to the shipyard in the past, he called his supervisors to have defendant's name verified. While Redmond was on the telephone, defendant entered the guard shack and retrieved the driver's license. As he reached for the license, defendant was little more than a foot from Redmond.

Redmond testified, "We got in each other's personal space when [h]e reached for the I.D." Defendant drove away and abandoned the stolen truck.

Redmond later identified defendant in a photographic lineup. Redmond testified, "I instantly recognized him."

The driver's license defendant handed to Redmond was not authentic. Although it depicted defendant's face, the state seal was an imitation, and the driver's license number corresponded to a female.

The Allegedly Suppressed Evidence

Defendant's *Brady* claim rests on the prosecution's purported failure to disclose that a second security guard, Aaron Cruz, was present during Redmond's encounter with defendant. The trial testimony of Redmond and the investigating detective established that, although Cruz was in the vicinity, he was engaged in a conversation with another truck driver and did not directly interact with defendant. The scope of Cruz's involvement was to fill out a gate pass for defendant by writing down information Redmond dictated to him.

The detective did not interview Cruz because, after speaking with Redmond, he did not think the conversation would yield anything of "evidentiary value." The detective's supplemental police report noted Cruz was present when Redmond spoke with defendant.[1]

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[1] "Q [by defense counsel]: There was no mention of Aaron Cruz in your colleague's report, Deputy Brannigan and his partner; right? [¶] A: No. [¶] Q: But you learned about Aaron Cruz from Mr. Redmond; is that right: [¶] A: Yes. [¶] Q: And

DISCUSSION

The Alleged Brady Violation

The prosecution has an affirmative duty to disclose material exculpatory evidence to the defense. (*Brady*, *supra*, 373 U.S. at p. 87.) "'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citations.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043.)

Evidence is material when it is reasonably probable that, had it been disclosed, the result of the trial would have been different. (*Kyles v. Whitley* (1995) 514 U.S. 419, 434; *People v. Jenkins* (2000) 22 Cal.4th 900, 954.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome of

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did you write that down in the report anywhere? [¶] A: Yes, I think I did in my supplemental report. [¶] Q: Would it refresh your recollection - - do you have [ ] a copy of your supplemental report? [¶] A: Yes. [¶] Q: Are you sure it's in your report or would reviewing it refresh your recollection? [¶] A: Reviewing it would refresh. [¶] [Defendant's attorney]: May he? [¶] The Court: All right. Let counsel know what page you're looking at. [¶] [Defense counsel]: [¶] Q: It's on page 3 of the report? [¶] A: Yes, paragraph three. [¶] Q: Did you reach out to Aaron Cruz or attempt to? [¶] A: No. [¶] Q: But you knew this gate pass thing was filled out by Mr. Cruz? [¶] A: As directed by Mr. Redmond, yes."

the proceedings. [Citations.]" (*People v. Jenkins, supra*, 22 Cal.4th at p. 954.) "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." (*United States v. Agurs* (1976) 427 U.S. 97, 109-110.)

The *Brady* rule serves ""'to restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery[.]'"" (*People v. Williams* (2013) 58 Cal.4th 197, 257.) "'[T]he prosecution . . . does [not] have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then . . . the defendant has all that is necessary to ensure a fair trial . . . .' [Citations.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1134, italics omitted, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

On appeal, it is the defendant's burden to establish a *Brady* violation. (*Strickler v. Greene* (1999) 527 U.S. 263, 289, 291.) "We independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence. [Citation.])" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.)

There was no *Brady* violation. First, our review of the record reveals no indication Cruz could have provided evidence favorable to defendant and no reason for the prosecution to think otherwise. The prosecution team had no obligation to "do what the defense can do just as well for itself[,]" i.e., locate and interview witnesses, like Cruz, who were working at the shipyard

when defendant interacted with Redmond. (*People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 715; *People v. Morrison* (2004) 34 Cal.4th 698, 715 (*Morrison*).)

We turn to the second component of *Brady* error—suppression of the evidence. Defendant has failed to establish the prosecution suppressed any evidence pertaining to Cruz. A *Brady* violation claim lacks merit when references to the allegedly suppressed evidence were contained in law enforcement records made available to the defense in discovery. (*Morrison, supra*, 34 Cal.4th at p. 714.) Cruz's presence was known or available to defendant at trial. It was specifically disclosed in the investigating detective's supplemental police report.[2]

The so-called undisclosed evidence was even referenced during the trial. Defense counsel acknowledged to the trial court that he met with Redmond who "told us about someone named Aaron" and that he intended to "ask [Redmond] about him." Ultimately, both Redmond and the investigating detective testified about Cruz's presence. "[E]vidence that is presented at trial is not considered suppressed [in violation of *Brady*], regardless of whether or not it had previously been disclosed during discovery. [Citations.]" (*Morrison, supra*, 34 Cal.4th at p. 715.)[3]

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[2] Defendant did not assert in the trial court (and does not claim on appeal) that the supplemental report was not provided to him in discovery.

[3] Also undermining defendant's *Brady* claim is that the trial court provided defendant an opportunity to continue the case to locate Cruz (defendant knew Cruz was employed as a security guard at the shipyard) and offered to consider a delayed

The third element of *Brady* error (prejudice/materiality), like the other two, is not supported by the record. Even if the evidence had been suppressed (and even if defendant could establish he was unaware of Cruz's presence), defendant has not shown a reasonable probability the result of the trial would have been different if he was told of Cruz's involvement. There is nothing in the record suggesting Cruz could have offered any evidence favorable to defendant. Mere speculation as to materiality will not support relief under *Brady*. (*Wood v. Bartholomew* (1995) 516 U.S. 1, 6; *People v. Salazar, supra*, 35 Cal.4th at p. 1052, fn. 9.)

The defense theory and the evidence introduced gives a strong impression that Cruz's testimony would have been immaterial. Defendant did not present any evidence. Rather, he argued to the jury that the police may have arrested the wrong person. But, Redmond was confident in his identification of defendant. He had ample opportunity to observe defendant when defendant handed him the driver's license and again when defendant retrieved it from the guard shack. Also, because the photograph of defendant's driver's license was introduced into evidence, the jury had an opportunity to independently examine it and determine whether it depicted defendant. The jury obviously resolved that issue against defendant and defendant offers no explanation of how Cruz, a man who did not interact with defendant, could have affected that determination.

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discovery instruction (see CALJIC No. 306), but defendant did not pursue either of those opportunities. (See *Morrison, supra*, 34 Cal.4th at p. 714; see also *People v. Arias* (1996) 13 Cal.4th 92, 151.)

As stated, it is defendant's burden to establish *Brady* error. He has not done so.[4]

Cumulative Error

Defendant points to an additional error—a deputy twice referred to another person who was involved in the crime even though the trial court had instructed him not to do so. Defendant concedes the deputy's mention of a second perpetrator, standing alone, was not prejudicial. Defendant argues the combination of the *Brady* violation and the deputy's error resulted in prejudice. Because we find no *Brady* violation, defendant's cumulative error claim fails.

Presentence Credits

The trial court awarded defendant 30 days of actual presentence credit and 30 days of conduct credit for a total of 60 days. We requested the parties provide supplemental briefs addressing whether defendant's presentence credit was properly

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[4] In his reply brief, defendant argues Redmond was an informant whose testimony was therefore unreliable. Defendant relies on the detective's testimony identifying People's exhibit 8, the photograph Redmond took of defendant's driver's license. The detective testified, "I recognize it as the photo that the informant, Tim Redmond, took on the night in question." Defendant's argument does not warrant appellate relief because it is improperly raised for the first time in his reply brief (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1005 [claims made for the first time in an appellate reply brief are generally disregarded]) and, in any event, it is clear the detective used the word "informant" to mean "witness."

calculated. The People submitted a brief taking the position that, because defendant was released on bail four days after he was arrested, he is entitled to four days each of actual and conduct credit. Defendant submitted a brief arguing we do not have the power to address the miscalculation because neither party requested correction of the credit. Importantly, defendant does not argue the trial court's calculation was correct.

To support his jurisdictional argument, defendant lifts language from *People v. Duran* (1998) 67 Cal.App.4th 267, 270 (*Duran*). In that case, the Attorney General argued the trial court miscalculated Duran's presentence credit and requested the appellate court correct the error. (*Id*. at pp. 269-270.) *Duran* pointed out, in prior cases, the Attorney General argued, under section 1237.1, the court lacked such authority when the defense raised the issue of miscalculated credit on appeal. (*Id*. at pp. 269-270.) However, when the Deputy Attorney General appeared for oral argument on *Duran*, he indicated the state's position changed such that the Attorney General conceded the appellate court "is empowered to correct these errors *whenever either side requests such relief,* so long as it is not the only issue on appeal. [Citation.]" (*Id*. at p. 270, italics added.) *Duran* accepted the concession and corrected the calculation error. (*Ibid*.)

It is the italicized language that defendant seizes upon to support his position. We are not persuaded. The People have, in their supplemental brief, argued defendant is entitled to four days each of actual and conduct credit. So, even if a "request" by a party were required to correct presentence credit, it has been made.

In addition, although *Duran* accepted and implemented the Attorney General's concession, defendant misunderstands the

source of an appellate court's power to correct the miscalculation. It is not, as defendant contends, contingent on the request of a party. Rather, in cases where the sentencing error is not the only issue on appeal, the appellate court's jurisdiction is derived from the fact that the miscalculation results in an unauthorized sentence—an error the appellate court has jurisdiction to correct upon discovery. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8 [miscalculation of conduct credit is a jurisdictional error which may be raised at any time]; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764 [computational errors concerning presentence credits "result in an unauthorized sentence" and are subject to correction by the appellate court]; see also *In re Ricky H.* (1981) 30 Cal.3d 176, 191 [appellate court has authority to correct an unauthorized sentence "whenever the error comes to the attention of the court"].)

The parties do not dispute the miscalculation of presentence custody credit and, in fact, the record supports the Attorney General's argument that the total credit should be eight days in custody. Because the miscalculation results in an unauthorized sentence, we order it corrected.

DISPOSITION

The judgment is modified to reflect a total of eight days of presentence custody credit consisting of four days of actual time and four days of conduct credit. Upon issuance of the remittitur, the trial court is to prepare an amended abstract of judgment reflecting the new credit figure and forward a certified copy to the

Los Angeles County Sheriff's Department. In all other respects, the judgment is affirmed.

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KUMAR, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.