

STATEMENT OF THE CASE

Lucio Garcia appeals his convictions for three counts of Child Molesting, each as a Class A felony, and three counts of Attempted Sexual Misconduct with a Minor, each as a Class B felony, following a jury trial. Garcia raises a single issue for our review, namely, whether the State failed to disclose to him potentially exculpatory evidence and thereby denied him his right to a fair trial.

We affirm.

FACTS AND PROCEDURAL HISTORY

Between December 31, 2004, and January 29, 2005, Garcia engaged twelve-year-old A.S. in sexual intercourse on three occasions. At the time, Garcia was thirty-two years old and had led A.S. to believe that they were “boyfriend-girlfriend.” Transcript at 70. On February 2, after receiving a report that A.S. may have been raped, Detective Steve Buchanan of the Indianapolis Police Department interviewed A.S. and learned of her relationship with Garcia.

On February 14, the State charged Garcia with three counts of child molesting, each as a Class A felony. The State subsequently amended the charging information to include three counts of attempted sexual misconduct with a minor, each as a Class B felony. On February 28, the State requested an in camera review by the trial court of unspecified documents provided by Child Protective Services, noting that “[s]uch documents are confidential, pursuant to statute; however, pursuant to discovery rules, the State may have a duty to disclose this information. The State cannot disclose this information without a Court Order mandating specific discovery.” Appellant’s App. at

63. That same day, the trial court ordered the State to disclose to Garcia “3 pages of documents received by [the] Court on 2/28/05.” Id. at 64.

Garcia’s trial occurred on August 8, 2006, in which the State called A.S. and Detective Buchanan as witnesses. A.S. testified that on each of the three dates in question, Garcia engaged her in sexual intercourse. And during Detective Buchanan’s cross-examination, the following exchange took place:

Q [by defense counsel Luther Garcia]: And I take it you subpoenaed [A.S.’s] medical records?

A Yes.

Q And was that to establish whether she was pregnant or not?

A No, that was—it was just what they call a “sexual assault exam.”

Q And where are those records?

A I may have a copy of them. I have a copy in my file. It was done at the Wishard Center of Hope.

Q May I?

A (No audible response.)

Q Huh, it says here . . .

MS. GAGEN [for the State]: Judge, I’m going to object to a commentary from the records.

THE COURT: Yeah. I mean, if you’ve got a question you can ask him about it. I’m not going to let you stand up there and read from there, though, sir.

MR. GARCIA: Well, Judge . . .

THE COURT: You can offer them.

MR. GARCIA: Yeah, I'd like to offer them, Judge.

THE COURT: All right. Why don't you mark them? Do you have any objection, Ms. Gagen?

MS. GAGEN: I have no idea what he has in his hands so I'd like to see them.

THE COURT: I think he indicated they were medical records.

MR. GARCIA: Medical records.

* * *

MS. GAGEN: There are things in here that are objectionable.

THE COURT: Such as—I haven't seen them.

* * *

MS. GAGEN: [T]here are many things in here that are objectionable[,] that's why we don't need to introduce . . .

THE COURT: Let me see them. All right, I see nothing in here—I mean, have you gave [sic]—did you get these?

MR. GARCIA: I never got these, Judge.

MS. GAGEN: Well, I think he did.

THE COURT: All right. What other records do you have, just this?

MR. GARCIA: That's the only one. I want it read.

THE COURT: All right. And your objection is what?

MS. GAGEN: Well, I don't object to the records in their entirety but I object to certain sentences that are contained within there that are not appropriate for the jury.

* * *

MR. GARCIA: I don't care if we redact all that stuff.

* * *

THE COURT: Defendant's A? Your objection is noted for the record. Defendant's A is offered and admitted into evidence over objection of the State.

* * *

CROSS[-]EXAMINATION RESUMED

Q Detective, did you review this record?

A Yes.

Q Did you note the section of this record that deals with [A.S.'s] vagina [and] notes "no scars, tears or interruptions"?

A And I wouldn't have expected any on this exam.

Transcript at 197-200.

A.S.'s medical record that Garcia had admitted as his Exhibit A (hereinafter referred to as "the medical report") stated that "[h]er hymen was estrogenized, flowered and redundant with no scars, tears or interruptions." Def. Exh. A at 2. The treating physician then concluded the medical report by stating that "[t]his examination is consistent with and neither supports nor negates concerns of sexual contact." Id. And on redirect, Detective Buchanan clarified that, based on his experience as a sex crimes investigator, physical evidence of sexual intercourse can be collected only within the first forty-eight hours following the act. However, since the evidence described in the medical report was collected ten days after Garcia last engaged A.S. in sexual

intercourse, Detective Buchanan did not expect that record to reflect any physical evidence of injury.

During their deliberations, the jury submitted a written question to the court, asking about the medical report. Specifically, the jury asked: “In the medical [report] . . . can we get clarification on ‘Her hymen was estrogenized, flowered and redundant’[—]what does this mean?” Appellant’s App. at 100. Without objection from Garcia, the court responded to the jury’s question by informing the jury that they had “received all of the evidence” and to “please re[-]read [the jury] instructions.” *Id.* Subsequently, the jury found Garcia guilty on all counts.

Following his convictions but before the sentencing hearing, Garcia filed a motion to require the State to disclose the medical report to him. The court granted Garcia’s motion that same day, even though the medical report had been entered into evidence. The State complied with the court’s order, and on September 6, the court merged Garcia’s attempted sexual misconduct with a minor convictions into his child molestation convictions and sentenced him to an aggregate term of forty years. This appeal ensued.

DISCUSSION AND DECISION

On appeal, Garcia maintains that he “did not receive a fair trial . . . because potentially exculpatory evidence was not provided to him by the State during the discovery process.” Appellant’s Brief at 3. As our supreme court has stated:

When evidence which should have been disclosed to the defendant during discovery is revealed for the first time at trial, the defendant has two remedies: move for a continuance or move for exclusion of the evidence. In describing the availability of these two alternatives, Justice Pivarnik wrote:

Exclusion of evidence, however, is usually invoked only when the State has blatantly and deliberately refused to comply with the Court's discovery order. The usual remedy is to allow the defendant a continuance in order to examine and meet the new evidence.

* * *

While sanctions for failure to comply with discovery are within the trial court's discretion, the primary factors which a trial court should examine are whether the breach was intentional or in bad faith and whether substantial prejudice has resulted.

Wiseheart v. State, 491 N.E.2d 985, 988 (Ind. 1986) (citations omitted). See also Smith v. Archer, 812 N.E.2d 218, 221 (Ind. Ct. App. 2004). Thus, in cases where there has been a failure to comply with discovery procedures, a continuance is usually the proper remedy. Fleming v. State, 833 N.E.2d 84, 91 (Ind. Ct. App. 2003). Failure to request a continuance, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the trial court's discovery order. Id. (citing Warren v. State, 725 N.E.2d 828, 832 (Ind. 2000)).

As an initial matter, Garcia's exclusive reliance on Brady v. Maryland, 373 U.S. 83 (1963), and its progeny is misplaced. In Brady, the prosecution withheld extrajudicial statements that, had they been released, would have favored the defendant. But it was not until after trial, conviction, and sentencing that the withheld statements were revealed. In contrast, the evidence in question here, which was not clearly favorable to Garcia, was revealed during, not after, trial. Brady applies to the discovery of favorable evidence after trial and does not apply here. Overstreet v. State, 783 N.E.2d 1140, 1154 (Ind. 2003) (citing Lowrimore v. State, 728 N.E.2d 860, 867 (Ind. 2000)), cert. denied.

Rather, the standards announced by our supreme court in Wiseheart apply as Garcia maintains that evidence revealed for the first time at trial should have been disclosed during discovery.

Here, Garcia learned of the alleged discovery violation during Detective Buchanan's cross-examination. But upon learning of the medical report, Garcia did not request a continuance. Rather, Garcia had the medical report admitted into evidence. Thus, assuming that the State violated the trial court's discovery order and that that violation harmed Garcia by not allowing him to examine and meet the evidence, Garcia should have requested a continuance. See Wiseheart, 491 N.E.2d at 988; Fleming, 833 N.E.2d at 91. Requesting a continuance would have cured any harm that arose from the State's conduct by giving Garcia the time necessary to identify and call an expert witness to explain the medical report to the jury. Therefore, Garcia's appeal on the grounds that the State's conduct resulted in harm to him is waived. See Fleming, 833 N.E.2d at 91.

Waiver notwithstanding, even had Garcia requested a continuance and the trial court had denied that request, we cannot say that such a decision by the trial court would have unduly prejudiced Garcia.¹ "Rulings on non-statutory motions for continuance, such as Defendant's, lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice." Maxey v. State, 730 N.E.2d 158, 160 (Ind. 2000). Here, Garcia only speculates that additional witnesses and evidence

¹ As Garcia cannot demonstrate prejudice, his proposal for sanctions against the State is inappropriate. See Wiseheart, 491 N.E.2d at 988. We also note that Garcia cites no evidence that the State acted intentionally or in bad faith. See id.

could be found if further investigation were permitted. Thus, “he has failed to demonstrate that the absence of such evidence establishes the specific harm requisite to a showing of an abuse of the trial court’s discretion.” Rhinehardt v. State, 477 N.E.2d 89, 92 (Ind. 1985). And, again, the medical report was inconclusive as to whether the examination had any relevance to “concerns of sexual contact.” Def. Exh. A at 2. Thus, even had Garcia properly requested a continuance and the trial court denied that request, we could not say that Garcia would have been unduly prejudiced by that decision.

Affirmed.

RILEY, J., and BARNES, J., concur.