SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-0186-22
A-0187-22

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

OSHER EISEMANN,

Defendant-Respondent.

Argued April 25, 2023 – Decided May 26, 2023

Before Judges Sumners, Geiger and Susswein.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-04-0059.

Lauren Bonfiglio, Deputy Attorney General, argued the cause for appellant (Matthew J. Platkin, Attorney General, attorney; Lauren Bonfiglio, of counsel and on the briefs).

Lee D. Vartan, argued the cause for respondent (Chiesa Shahinian & Giantomasi PC, attorneys; Lee D. Vartan and Melissa F. Wernick, on the brief).

PER CURIAM

Tried by a jury, defendant Osher Eisemann was found guilty of second-degree financial facilitation of criminal activity (money laundering) and second-degree misconduct by a corporate official. The offenses arose from his role as Executive Director of the School for Children with Hidden Intelligence (SCHI or school) and President of the Board of Trustees of Services for Hidden Intelligence, LLC (the foundation), SCHI's fundraising organization. He was found not guilty of first-degree corruption of public resources, second-degree theft by unlawful taking, and second-degree misapplication of entrusted property and property of government. He was sentenced to two consecutive thirty-day jail terms and two consecutive one-year probationary terms. The foundation was charged with the same offenses as defendant but was found not guilty of all charges.

Defendant appealed the conviction, while the State appealed the sentence. In an unpublished decision, we affirmed defendant's conviction but remanded for resentencing before a different judge because the trial judge did not comply with our sentencing guidelines. State v. Eisemann, No. A-3781-18 (App. Div. Dec. 31, 2020) (slip op. at 49), certif. denied, 246 N.J. 147 (2021).

Prior to resentencing, defendant filed a motion for a new trial based upon newly discovered evidence — a statement by Rochel Janowski, one of the foundation's bookkeepers, concerning the school's QuickBooks account entry she made that formed the basis of his conviction. In opposing the motion, the State produced, "Exhibit F," an audit trail of the school's QuickBooks account the State prepared a year prior to trial, showing that "rochel," Janowski's username, was the person who made the QuickBooks entry in question. Defendant had not previously seen Exhibit F because the State did not produce it in discovery. Over five months later, defendant responded with another motion for a new trial, this time arguing the State's failure to disclose Exhibit F prior to trial constituted prosecutorial misconduct in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963).

The State successfully moved to have the trial judge recuse himself from considering the new trial motions. A different judge (motion judge) granted defendant a new trial based on the newly discovered evidence and because of the Brady violation. The motion judge denied the State's motion to stay the trial.

We granted the State's motion for leave to appeal the order granting defendant a new trial. We also granted the State's motion to stay the trial.[1]

Before us, the State contends in a single point:

> THE JUDGE ERRONEOUSLY ORDERED A NEW TRIAL.
>
> > A. The identity of defendant's bookkeeper is not newly discovered evidence.
> >
> > B. The State had no obligation to disclose the identity of defendant's bookkeeper and information in his own records.

Having considered the parties' arguments and applicable law, we affirm because the motion judge did not abuse his discretion in granting defendant a new trial.

I.

The trial testimony disclosed the following financial transactions and ensuing investigation relevant to this appeal.

On March 13, 2015, defendant purchased two cashier's checks using funds from the school's bank account totaling $230,000. A $30,000 check[2] made payable to defendant was deposited in his personal checking account, which he

[1] Filed under docket number A-0187-22, this appeal has concluded.

[2] This check was not the subject of defendant's convictions.

shared with his wife. A second check in the amount of $200,000 was issued in mid-March to GZYD, a company owned by Jonathan Rubin, which made loans to individuals in the Lakewood community. Defendant told Rubin he was concerned that his loan to a third party would not get repaid without engaging in litigation, so he asked Rubin to act as a nominee for the loan, making the loan from the check he issued to GZYD. Rubin had previously done similar transactions with other individuals.

Accordingly, Rubin issued a check on March 19, for $200,000 from GZYD to TAZ Apparel (TAZ), the entity to which defendant wished to loan money. TAZ, a defunct online clothing company, was owned by Aaron Gottlieb and defendant, and defendant had loaned money to the company in the past. Gottlieb deposited the check from Rubin and, at defendant's instruction, wrote a check to defendant for $200,000. Defendant deposited Gottlieb's check into his personal bank account, and then wired $200,000 from that account to SCHI.

At the time of these transactions, Ahuva Gruen was business manager and head bookkeeper of SCHI. The foundation's SCHI QuickBooks account showed that on March 18, Gruen recorded the $200,000 defendant withdrew on March 13 as a debit to an account entitled "O. Eise Loan: Gemach GYZD" (the Gemach

GYZD account). Gruen did not respond to a subpoena to testify before the grand jury and was not called as a witness at trial.

When the $200,000 was wired to the school on March 25, its QuickBooks account showed someone with the username "rochel" credited the funds to an account entitled "O. Eise Loan:osher 022" (the "Osher 022 account"). The entry was made May 20.

On June 29, law enforcement officers obtained warrants to search the foundation's records. Monmouth County Prosecutor's Office Detective Thomas Page had begun investigating SCHI earlier that year concerning an alleged misuse of public funds for non-school related purposes. Page concluded improper expenditures were made from SCHI's bank account, where tuition money from the Lakewood Board of Education, intended for Lakewood students attending the school, was deposited. He did not closely consider other SCHI accounts and conceded, despite the school's receipt of substantial private donations, he had "no idea" how much money came into the school from those sources. Even though Page characterized the $200,000 at issue in this appeal as defendant's debt payment to the foundation or SCHI, the State provided no evidence of any debt.

The Prosecutor's Office's Financial Crimes Bureau Deputy Chief of Detectives William Fredrick testified regarding a compilation of QuickBooks information and S-90, an audit trail he created by electronically manipulating the school's QuickBooks records, showing withdrawal of $200,000 from the school's account and that "admin." (Gruen) had entered the transaction in QuickBooks. Defendant objected to Fredrick testifying about S-90 on the grounds that he was not an expert in accounting software and did not create the QuickBooks records, but the trial court overruled the objection. Significantly, Fredrick never discussed Exhibit F—a document that was created a year prior to trial that the State failed to produce in discovery—which was the second half of the audit trail establishing that "rochel" and not "admin." had entered the return of the $200,000 to the Osher 022 account.

With respect to the return of the $200,000 withdrawn from the school's bank account, Fredrick, who was not an accountant, testified:

> So, the only other transaction that was—that occurred within the general ledgers or that we saw within the general ledgers was when the $200,000 came back from Osher 022, the personal bank account of [defendant] and [his wife]. When that money came back into the school, it was reflected . . . at the school level . . . as a reduction to the S-2000 SCHI loan account and an increase to [defendant's personal account]. At the foundation level, the accounting in the general ledger reflected a decrease in the SCHI loan account and a

> decrease to the Osher—loan payable OIZ loan, Osher 022 general ledger account.

Fredrick further stated the $200,000 deposited to the school's account, "decreased the Osher 022 account," thereby decreasing a loan defendant owed to SCHI.

Through Fredrick's cross-examination, defendant introduced a certification by certified public accountant Phillip A. Stern, stating that a financial audit of the foundation revealed, that as of June 30, 2014, the foundation owed defendant $321,750, and as of June 30, 2015, the foundation owed him $351,750. As of 2021, the debt SCHI owed to defendant was over $300,000 and was not repaid, according to Stern.

Ari Ehrlich, Controller and Chief Financial Officer for both SCHI and the foundation, testified for both the State and defendant, stating the school's records prior to June 2016 were inaccurate and there were material mistakes in the QuickBooks records.

Eli Leshkowitz, a lawyer and forensic accountant, testified the school's QuickBooks accounts were "completely unreliable" with respect to tracking the flow of money between the school and the foundation. Regarding the alleged theft of public funds, Leshkowitz found the school always had sufficient private funds to cover the transactions questioned by the State. According to

Leshkowitz, it was necessary to look at all school and foundation accounts to determine whether private donations or public funds were used for the expenditures.

Approximately six months after we affirmed the jury's verdict but vacated defendant's sentence, he moved for a new trial, relying primarily upon a certification by Janowski.[3] She stated that in 2015, she was one of three bookkeepers for SCHI and the foundation, but did not have a background in accounting. She stated she never shared her QuickBooks's password access with defendant, who did not: make QuickBooks entries, have QuickBooks login credentials, or instruct her to make a particular entry, including the entry presently in question.

Janowski's certification addressed QuickBooks entries made between March 18 and 25, 2015. She stated that, on May 18, in "record[ing] the March

[3] Defendant also produced certifications from: (1) Stern, that, as of June 30, 2015, the foundation owed defendant $351,750, but defendant owed the foundation nothing; (2) Leshkowitz, that the Osher 022 account had 372 entries and, of those, 139, or thirty-seven percent, were "general journal" entries accounting for nearly $3 million, consistent with Janowski's statement that Osher 022 was a dumping account and did not actually represent funds owed by defendant; and (3) Ehrlich, that he had been newly employed at SCHI at the time of trial but later discovered and informed defense counsel that Janowski was a bookkeeper in May 2015 and might be able to explain the transactions that occurred in March 2015. These certifications, while possibly relevant at a new trial, do not impact our decision whether defendant is entitled to a new trial.

13, 2015 portion of the transaction in the Foundation's QuickBooks," a different "bookkeeper increased the Foundation's liability to the School by $200,000 and increased the liability owed in a QuickBooks ledger 'O. Eise Loan: Gemach GZYD' by $200,000 to balance the transaction." In addition, she stated that, on May 20, she recorded the "March 25 . . . component of this transaction," and in doing so, she "reduced the Foundation's liability to the School by $200,000 and credited the QuickBooks ledger 'O. Eise Loan:osher 022' $200,000."

According to Janowski, her March 25 entry was meant to balance the foundation's books and was not intended to erase a debt owed by defendant; she mistakenly credited the Osher 022 account, when she should have credited the Gemach GYZD account to properly balance the books. She also stated that the 022 account was used as a "dumping" account when she and the other bookkeepers did not know how to attribute a particular transaction; it was never used to account for monies owed by defendant to the foundation.

The certification also explained why Janowski did not come forward earlier about her QuickBooks entry. In 2019, when defendant went to trial, she was no longer employed by the school and did not approach his counsel because she was unaware of the specific allegations made against him and did not know they involved her entry.

Before the trial judge recused himself from hearing defendant's request for a new trial, he planned to hold an evidentiary hearing regarding Janowski's certification. The motion judge, however, decided it was not warranted because Janowski's credibility should be determined by the jury, not a judge. Three months later, after oral arguments, the judge granted defendant's motion for a new trial, explaining his reasoning from the bench.

II.

A motion for a new trial is guided by Rule 3:20-1, which provides:

> The trial judge on defendant's motion may grant the defendant a new trial if required in the interest of justice. . . . The trial judge shall not, however, set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law.

We only upset a motion judge's order where "a clear abuse [of discretion] has been shown." State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000).

A. Newly Discovered Evidence

A defendant is permitted to seek a new trial on the ground of newly discovered evidence at any time. State v. Szemple, 247 N.J. 82, 99 (2021) (quoting R. 3:20-2). In State v. Carter, the Court repeated the well-established standard for granting a new trial based on newly discovered evidence:

> [T]o qualify as newly discovered evidence entitling a party to a new trial, the new evidence must be (1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted.
>
> [85 N.J. 300, 314 (1981).]

"All three tests must be met before the evidence can be said to justify a new trial." Ibid. (citing State v. Johnson, 34 N.J. 212, 223 (1961)). "Under prong one of the Carter test, [courts] first must look to the issue of materiality as that term pertains to the defense in a criminal case." State v. Ways, 180 N.J. 171, 188 (2004) (citing Carter, 85 N.J. at 314). "Material evidence is any evidence that would 'have some bearing on the claims being advanced.'" Ibid. (quoting State v. Henries, 306 N.J. Super. 512, 531 (App. Div. 1991)).

Applying these principles, we disagree with the State's contention the motion judge erred in granting defendant a new trial. The State contends: Janowski's identity is not newly discovered evidence; her certification fails to show defendant was not guilty, because the only legitimate interpretation of the financial transaction is that defendant used the funds to pay down his debt to the school; and her statement that she made a mistake and the Osher 022 account was a "dumping account" were directly inconsistent with her other statements,

cumulative of evidence presented at trial, or contrary to Fredrick's testimony and documentary evidence. .

To establish money laundering under N.J.S.A. 2C:21-25(b)(2), the State must prove an underlying criminal activity, as well as an attempt to conceal it. See State v. Diorio, 216 N.J. 598, 622-23 (2014). "'[C]oncealing' occurs when the transaction involves hiding the proceeds acquired in the criminal enterprise." State v. Marias, 463 N.J. Super. 526, 533 (App. Div. 2020) (citing State v. Harris, 373 N.J. Super. 253, 264-65 (App. Div. 2004)). To convict a defendant for misconduct by a corporate official under N.J.S.A. 2C:2l-9(c), the State had to show defendant "purposely or knowingly use[d], control[led] or operate[d] a corporation for the furtherance or promotion of any criminal object." The State incorrectly argues it only had to prove that defendant paid the school with the school's own $200,000 funneled through GZYD and TAZ, thereby making his $200,000 payment to the school "the money laundering transaction," not the later QuickBooks entry.

The motion judge found a new trial was warranted because defendant satisfied Carter's three prongs that the evidence in Janowski's statement was material, was not discoverable beforehand, and would probably change the jury's verdict. The judge explained the State's only evidence that defendant owed a

debt to the school or the foundation was Fredrick's testimony. At argument, the judge questioned whether "the debt is really an inference drawn by . . . Fredrick[] based on this one entry [by Janowski in QuickBooks] that he interpreted, which is now being refuted by [Janowski]?" The State agreed there would have been no evidence of money laundering without Janowski's entry.

Janowski's certification was material because it explained her QuickBooks entry should not be considered as proof that defendant was paying back a loan from the foundation. Because Janowski, unlike Fredrick, was "directly responsible for the bookkeeping" entry, the judge determined her testimony would probably "exonerat[e] defendant."

The judge found "under the circumstances and facts of this case, the defense did not fail to exercise reasonable diligence in discovering Janowski prior to trial." The judge reasoned that, despite access to the QuickBooks accounts prior to trial, defendant did not know which of the "countless pages of journal entries" the State would focus upon to establish defendant's guilt. The judge noted there were 342 QuickBooks ledgers entitled "O. Eise Loan" and to sift through this material and predict what the State would take issue with would have "demanded a Herculean effort." The judge also stated:

> Even if Janowski's involvement was discoverable through reasonable diligence prior to trial, her

> testimony, if believed, would completely exonerate defendant and clearly alter the verdict. Where such exonerating evidence exists, our Supreme Court appears to relax, if not altogether eliminate prong two of the Carter test. To do otherwise would surely unjustly elevate form above substance.

The motion judge did not abuse his discretion in ordering a new trial. The record supports his determination that no evidence in the record shows defendant had an outstanding loan with the school, other than Fredrick's interpretation of "rochel['s]" QuickBooks entry. Considering the jury did not hear any evidence contradicting Fredrick's interpretation, defendant should be permitted to present Janowski's testimony. Should the jury credit Janowski's statement that her entry was made in error, and dismiss Fredrick's testimony, the State would not have proved an element of money laundering, because there is no proof defendant attempted to conceal financial wrongdoing by deceitfully attempting to pay down a debt to the school.

As for the State's argument that the judge should have held an evidentiary hearing to examine the veracity of Janowski's certification pursuant to Rule 3:22-10(b), it lacks merit. Rule 3:22-10(b) provides:

> A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief [PCR], a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to

> the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief.

Assuming arguendo that a hearing should have been held, the State is barred under the doctrine of invited error "from raising an objection for the first time on appeal." State v. A.R., 213 N.J. 542, 561 (2013). The State originally argued against an evidentiary hearing, and ultimately agreed a hearing was not necessary. Thus, "[t]he doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 340 (2010) (quoting Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996)).

Putting aside the State's invited error, the judge did not abuse his discretion under Rule 3:22 in not conducting a hearing for a PCR petition. See Russo, 333 N.J. Super. at 138. This is unlike the situation in State v. Buonadonna, 122 N.J. 22, 50-51 (1991), which the State argues supports its position that a hearing should be held. There, the Court found the later discovered affidavits were "sketchy" and "highly suspect" given that two of the affiants were the defendant's mother and sister who were heavily involved with

his defense and had been characterized as hostile witnesses. Ibid. The other two affiants were employees of the defendant's mother. Ibid. Here, there was no finding that Janowski's certification was "sketchy" or "highly suspect," nor was there any reason to question her credibility, especially given the only evidence of money laundering was Fredrick's interpretation of her QuickBooks entry. Moreover, Janowski never participated in defendant's defense and was not a hostile witness.

B. Brady Violation

Considering our conclusion that the motion judge did not abuse his discretion in granting defendant a new trial based on the newly discovered evidence in Janowski's certification, we need not address whether the State's failure to provide Exhibit F to defendant before the trial was a Brady violation. Nevertheless, for the sake of completeness and to guide future pretrial conduct, we address the issue.

The State argues there was no Brady violation because it could not have suppressed evidence which existed in defendant's own records. The State cites Rector v. Johnson, 120 F.3d 551, 558-59 (5th Cir. 1997), which held "[t]he State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be

discovered by exercising due diligence." The State maintains no Brady violation occurred because defendant could have discovered evidence of Janowski's entry from the QuickBooks ledgers within his possession. It also relies upon State v. Robertson, 438 N.J. Super. 47, 68-69 (App. Div. 2014), where we held there was no Brady violation when documents are not controlled by the State but by a victim or a private company. We are unpersuaded.

"A prosecutor's obligation to 'turn over material, exculpatory evidence to the defendant' is well established and does not require extended discussion." State v. Nash, 212 N.J. 518, 544 (2013) (quoting State v. Morton, 155 N.J. 383, 413 (1998)). "The obligation extends as well to impeachment evidence within the prosecution's possession." Ibid. (citing Strickler v. Greene, 527 U.S. 263, 280 (1999)). "A breach of this duty of disclosure — in appropriate circumstances — violates a defendant's due process rights." Ibid. (citing Brady, 373 U.S. at 87). "However, the due-process guarantee does not impose on a prosecutor a constitutional duty to investigate." Ibid.

There are three elements to a Brady violation: "[t]he evidence must be favorable to the accused; it must be suppressed by the prosecution; and it must be material." State v. Nelson, 155 N.J. 487, 497 (1998). As to the first element, the United States Supreme Court has noted the Brady rule encompasses

exculpatory evidence. See United States v. Bagley, 473 U.S. 667, 676 (1985). As to the second element, the disclosure rule "applies only to information of which the prosecution is actually or constructively aware." Nelson, 155 N.J. at 498. As to the third element, the evidence is deemed material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682; see also State v. Landano, 271 N.J. Super. 1, 36 (App. Div. 1994).

For the same reasons noted above with respect to defendant's discovery of Janowski's certification, we conclude the motion judge did not abuse his discretion finding the State's failure to disclose Exhibit F was a Brady violation. Exhibit F was not in defendant's possession because it was created by Fredrick's manipulation of the QuickBooks records, but it was material to defendant's defense because it showed the State's reliance on Janowski's entry to establish defendant's money laundering. As the judge found, Janowski's identity would not have been readily discernable upon examination of the school's records without substantial manipulation of the QuickBooks software.

Creating Exhibit F involved manipulation of QuickBooks, as Fredrick described at trial. The State produced S-89 and S-90 at trial, but withheld Exhibit F, the second half of the audit trail, showing that Janowski, not Gruen, made the entry pertaining to the return of the $200,000 to the 022 account. Defendant was not aware at trial of Janowski's role in the State's case, thereby reasonably relying on S-89 and S-90, which seemed to establish that Gruen was responsible for all the QuickBooks entries. Thus, even if defendant manipulated QuickBooks as Fredrick did, the fact remains the State did not disclose Exhibit F—which it created—to defendant.

Accordingly, we see no basis to disagree with the motion judge that the State committed a Brady violation because it denied defendant his constitutional right to a fair trial in not disclosing Exhibit F.

Affirmed.