Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-171

JUNE TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
	}	
David Judd	}	DOCKET NO. 256-5-06 Oscr
		Trial Judge: Edward J. Cashman

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment of conviction of several counts of dispensing illegal drugs and one count of possession. He contends the court erred in: (1) excluding the testimony of an alibi witness as a discovery sanction; and (2) admitting certain audiotapes, portions of which were unintelligible. We affirm.

The record evidence may be summarized as follows. In late 1995, T.C. agreed to assist the Vermont Drug Task Force in its investigation of drug trafficking and informed them that she could purchase drugs from defendant and his girlfriend Cynthia. On the afternoon of December 5, 2005, T.C. placed a telephone call and spoke briefly with defendant about purchasing marijuana. The conversation was recorded pursuant to a warrant authorizing the seizure of conversations with Cynthia; the recording was terminated when the police realized that defendant had answered the phone. Shortly thereafter, T.C. met with officers of the Drug Task Force. She was searched to ensure that she carried no drugs, fitted with an electronic recording device, and provided with $180 to purchase marijuana.

The officers observed T.C. enter defendant's residence. T.C. testified that, once inside, she paid Cynthia and observed her hand the money to defendant, who was weighing marijuana on a scale. Defendant then handed her the drugs. After she left, T.C. gave the drugs to officers of the Drug Task Force and was paid $50 for her efforts. On December 20, 2005, T.C. met again with officers of the Drug Task Force, was searched and wired, and provided with $330 to purchase marijuana and pills. The officers observed her enter defendant's residence. T.C. testified that defendant took the money and provided her with five pills later determined to be hydrocodone, a prescription narcotic used for pain relief. Shortly thereafter, marijuana was delivered to the residence and given to T.C. The police recovered the drugs from T.C. and paid

her $75. Several months later, defendant was arrested at his residence for the earlier drug transactions. A search revealed additional marijuana in the bedroom and kitchen. After his arrest, defendant contacted Drug Task Force officers and offered to "work off" the charges against him, but no agreement was entered into.

In May 2006, defendant was charged with three counts of dispensing or aiding in the dispensing of marijuana and hydrocodone, and one count of possession of marijuana.[*] Shortly thereafter, he was arraigned and entered pleas of not guilty. Status conferences were held in August and October, and a pre-trial conference was held on November 8, 2006, at which it was determined that the case was ready for trial. A jury draw was held the next day, a jury was drawn, and trial was set to commence on November 30. At the jury draw, defense counsel orally informed the State that defendant intended to present an alibi defense and witness. Within a few days, defendant identified the witness as his mother, provided her address, and indicated that she would testify that, at the time of the alleged offense on December 5, 2005, she had attended a deposition with defendant and later went out to dinner with him. Defendant proffered no reason for the delayed disclosure. On November 20, 2006, defendant sent a letter to the State providing further details of the proposed alibi defense, although the State had apparently not received the letter when it drafted and filed a motion in limine, on November 22, seeking to exclude the alibi testimony as untimely under V.R.Cr.P. 12.1(a).

Under this rule, a defendant who wishes to offer an alibi "must give written notice thereof, together with the information required by subdivision (b) of this rule, to the prosecuting attorney on the date of the status conference, or at least 10 days prior to trial, whichever is sooner." V.R.Cr.P. 12.1(a). Subdivision (b) requires a "written statement of the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses upon whom he intends to rely to establish such alibi." Under subsection (c), the prosecutor must similarly provide the names and addresses of any witnesses intended to rebut defendant's alibi defense. Upon the failure of either party to comply with the requirements of the rule, subsection (e) provides that the court, "except for good cause shown, shall exclude the testimony of any witness offered by such party as to the issue in question." The State argued that, to be in compliance with the Rule, defendant should have provided the required written statement at the pre-trial conference on November 8, 2006.

In addition to the State's motion to exclude the alibi testimony, defendant filed a motion in limine to exclude the audiotapes of the December 5th telephone conversation and the subsequent drug transactions on the grounds, among others, that defendant was not included in the telephonic search warrant and that portions of the tapes were inaudible and would result in undue prejudice.

The court addressed the motions on the morning of November 30, 2006, the first day of trial. Defendant argued that he had complied with the spirit of Rule 12.1 and provided adequate notice by informing the State one day after the pre-trial conference of his intent to present an alibi defense and the general nature of the defense, by providing the name and address of the witness within days thereafter, and by sending written notice with additional information on November 20, ten days before trial. The trial court granted the State's motion in a brief order,

[*] A fifth count of possession of fireworks was dismissed at trial.

explaining that defendant's written notice was untimely under the rule, and that the earlier, oral notice was too vague to provide adequate notice. The court denied defendant's motion to exclude the audiotapes.

Thereafter, in addition to the testimony of T.C., the State presented the testimony of the two law enforcement officers who supervised the investigation and a Vermont state chemist. Defendant called a friend, who testified that she had never seen him use or sell drugs, and was present at his house when T.C. was there, and had not witnessed any drug transactions between the two. The jury returned a verdict of guilty on all four counts. The court denied a subsequent motion for judgment of acquittal and motion to dismiss in the interests of justice. Defendant was sentenced to an aggregate term of two to five years. This appeal followed.

Relying principally on out-of-state authority, defendant asserts on appeal that, in deference to his "constitutional right to present a defense," the trial court should not have granted the motion to exclude his alibi witness absent a showing that the untimely disclosure would prejudice the State. The State argues, in response, that absent a showing of "good cause" under V.R.Cr.P. 12.1(e), exclusion of the alibi witness was mandatory, and that defendant made no argument or showing of good cause for his failure to comply with the rule. Many courts, including our own, have recognized that "[i]n appropriate circumstances, preclusion of witnesses as a discovery sanction does not offend defendant's right to compulsory process for obtaining witnesses in his favor under the Sixth Amendment to the United States Constitution." State v. Edwards, 153 Vt. 649, 649 (1989) (mem.). To determine the propriety of such a sanction, we have applied a balancing test, weighing the defendant's right against "the integrity of the adversary process . . . the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." Id. (quoting Taylor v. Illinois, 484 U.S. 400, 414-15 (1988)).

The difficulty here is that defendant offered no argument or evidence at trial to allow such a balancing process. Defendant did not assert his right to compulsory process below or attempt to demonstrate that it outweighed the strong countervailing interests in prompt disclosure embodied in the V.R.Cr.P. 12.1; he did not offer any explanation for the untimely disclosure of the alibi witness to permit the court to determine whether it was willful or merely negligent. Defendant would have been aware of the alibi from the moment he was charged, some six months before the notice at jury draw. Defendant did not address clearly the question of prejudice or lack thereof resulting from the untimely disclosure; and he did not request a less drastic remedy to exclusion, such as a continuance or attorney sanctions, or attempt to demonstrate that such a remedy was adequate in the circumstances. See, e.g., Wade v. Herbert, 391 F.3d 135, 142-44 (2d Cir. 2004) (discussing and applying such factors as the willfulness and timing of the non-disclosure of an alibi witness as they reflect on the question of potential fabrication, potential prejudice to the state, and adequacy of alternative remedies). The record is therefore inadequate to properly review and analyze the claim, and thus affords no basis to disturb the court's ruling. See State v. Barbera, 2005 VT 13, ¶ 13, 178 Vt. 498 (mem.) (appellant carries the burden of ensuring an adequate record to support the points raised on appeal).

Defendant also claims that the court erred in denying his motion to exclude the audiotape recordings of the December 5, 2005, telephone conversation with T.C. and the two subsequent drug transactions which she recorded in defendant's residence. The first tape shows that

defendant answered the call from T.C. Significant portions of the other tapes are inaudible although they reveal the voice of a man referred to as Dave. Defendant maintains that the tapes were irrelevant since they provided no intelligible context or direct evidence of the drug deals, while unfairly boosting the T.C.'s credibility by purporting to be additional evidence of defendant's involvement. Thus, he asserts that any probative value was substantially outweighed by the danger of unfair prejudice in misleading the jury.

While the record leaves some uncertainty as to whether all of the tapes were actually played for the jury, we find, in any event, that any error in their admission was harmless beyond a reasonable doubt. See State v. Wigg, 2005 VT 91, ¶ 11, 179 Vt. 65 (error may be deemed harmless where it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict regardless of the error) (citation omitted). The observations of the police clearly established that T.C. purchased drugs at defendant's residence, and T.C. provided detailed testimony concerning the transactions and defendant's active participation therein. Police testimony further established that, after his arrest, defendant volunteered to "work off" the charges against him, without any protestation of innocence. Accordingly, the substantial evidence leaves no reasonable doubt that the jury's verdict would have been the same absent the tapes. See People v. Fayette, 657 N.Y.S.2d 827, 829 (N.Y. App. Div. 1997) (holding that admission of partially inaudible tapes was harmless in light of fact that participant in conversation testified as to its contents and other evidence amply supported verdict). That large portions of the tapes were unintelligible, as defendant notes, indicates that they did little or nothing to support the State's case, and defendant's assertion that they somehow buttressed T.C.'s credibility by inviting speculation is itself highly speculative. T.C.'s credibility was tangibly impeached by the evidence that she received payment from the police, had been promised that her record would be cleared in return for her cooperation, had a criminal history, and had used drugs while working for the police; the record does not support defendant's claim that the tapes somehow unfairly bolstered her credibility. Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice