**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

No. 92-2193

JAMES EDDIE BROWN,

Petitioner-Appellant,

versus

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-1969)

(February 16, 1994)

Before POLITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge, and PICKERING[*], District Judge.

POLITZ, Chief Judge:[**]

James Eddie Brown, incarcerated in the Texas Department of Criminal Justice on a rape conviction, appeals the denial of his

[*] District Judge of the Southern District of Mississippi, sitting by designation.

[**] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

petition under 28 U.S.C. § 2254 for a writ of habeas corpus. Finding no reversible error, we affirm.

## Background

Lana Lanik, the complaining witness, testified at trial that Brown first contacted her on a Friday as part of a telephone survey of local social clubs. Brown turned the conversation to personal subjects and followed up with repeated telephone calls over the weekend, urging her on Sunday evening to visit him at his hotel residence. She acceded and was raped.

Brown testified to a different version of events. He agreed that he had called Lanik on Friday in connection with his telephone solicitation job. But he maintained that Lanik had surprised him with a visit on Friday evening. They chatted for about an hour until he asked her to leave. Brown insisted that he never saw Lanik again.

Crediting Lanik, the jury convicted Brown of rape and sentenced him to 35 years imprisonment. His conviction was affirmed on direct appeal.[1] After unsuccessfully seeking collateral relief in state court Brown filed the instant petition. Adopting the magistrate judge's report and recommendations, the district court entered summary judgment for the state, denying habeas relief. The trial court granted a certificate of probable cause and Brown timely appealed. We appointed counsel to represent

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[1] **Brown v. State**, 692 S.W.2d 146 (Tex.App. 1985), aff'd, 757 S.W.2d 739 (Tex.Crim.App. 1988).

Brown on appeal.

## Analysis

Brown raises only two issues that merit discussion. One is his contention that his **Brady**[2] rights were violated by the state's failure to disclose a police incident report. The other is that he received ineffective assistance of counsel because his trial lawyer failed to object to expert testimony. We conclude that neither point of error warrants grant of the Great Writ.

1. **Brady** violation.

After trial Brown obtained the police incident report containing Lanik's first description of the incident to the police.[3] The report referenced a "first date" prior to Lanik's encounter with Brown on Sunday night. This reference tended to impeach Lanik's trial testimony and corroborate Brown's, and in so doing tended to support his theory that Lanik accused him of rape because he had rejected her. Despite a pretrial **Brady** request the report was not produced. Brown contends that this was reversible error.

To prevail on a **Brady** claim, the defendant must show that (1) the prosecution suppressed evidence (2) favorable to the

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[2]**Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[3]He obtained the report in connection with a civil lawsuit claiming conversion of his personal property by the arresting police officers.

accused and (3) material to either guilt or punishment.[4] The state contends that Brown failed to make out the first and third elements of his claim.

According to an investigator engaged by Brown, the police incident report was prepared by an officer who interviewed Lanik in the hospital the day after the rape. At that time she did not wish to prosecute. The officer did not file his report until two days later. By then Lanik had changed her mind about prosecuting and repaired to the police station to file a complaint. The lieutenant on duty could not find the initial report and assigned the case to Dective Oscar Chavarria, who interviewed Lanik and pursued his investigation on the basis of that interview. Chavarria apparently was unaware of the report and did not include it in the investigative materials that he presented to the prosecutor. The state maintains that failure to produce the report under these circumstances did not rise to the level of withholding evidence within the meaning of **Brady**. We cannot agree.

It is well settled that the prosecution cannot insulate itself from **Brady** accountability by pleading ignorance of the existence of exculpatory material if the investigatory arm of the prosecution team is aware of the material. Knowledge on the part of any component of the prosecution team is knowledge of the team as a

[4]**Edmond v. Collins**, 8 F.3d 290 (5th Cir. 1993). Because of our disposition of this case, we need not address dictum in **Kyles v. Whitley**, 5 F.3d 806 (5th Cir. 1993), to the effect that **Brady** violations are subject to a separate harmless error test above and beyond materiality.

whole.[5] It is similarly well established that the obligation to disclose extends not only to material in the prosecution team's actual possession but also to material readily available to it.[6] Finally, it is beyond dispute that nondisclosure can violate **Brady** whether it is the "result of negligence or design."[7]

The police officer who wrote the report contributed to the investigation by conducting the initial interview of Lanik. He was a member of the prosecution team and his knowledge of the report is imputed to the team as a whole. Neither his late submission of the report nor the police department's failure to place it in the investigative file relieves the prosecution of its **Brady** obligations.

We are persuaded, however, that Brown has not shown materiality within the meaning of **United States v. Bagley**.[8] **Bagley** established that exculpatory evidence is material for **Brady** purposes

> 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

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[5]See, e.g., **United States v. Auten**, 632 F.2d 478 (5th Cir. 1980); **Smith v. Florida**, 410 F.2d 1349 (5th Cir. 1969). The cases cited by the state involve the obligation of federal prosecutors to obtain materials in the possession of state authorities and hence are inapposite.

[6]**Auten**; **United states v. Deutsch**, 475 F.2d 55 (5th Cir. 1973).

[7]**Giglio v. United States**, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[8]473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

confidence in the outcome.[9]

There is force to Brown's argument that the police incident report undermines confidence in the verdict because it contradicts Lanik's testimony that she never saw Brown before the Sunday night incident while supporting Brown's assertion that she visited him on Friday night. Ultimately, however, a consideration of the record as a whole compels the conclusion that there is no reasonable probability that production of the report would have changed the result.

Confronted with the police report by Brown's investigator, Lanik admitted telling the officer of a prior date and claimed that she had lied because she was ashamed that she had gone to a man's apartment without previously meeting him. That explanation is consistent with her initial reluctance to press charges; according to a friend, she refused to notify the police because she did not "want anyone to know." It also is consistent with her trial testimony: "I just couldn't forgive myself for being so stupid."

More importantly, while Lanik's report of a prior date bolsters Brown's theory, the theory itself is highly improbable. Brown does not dispute that Lanik had intercourse -- the laboratory reports prove that she did. Rather, he contends that she had intercourse, consensual or not, with someone else and accused him of rape because she felt rejected when he asked her to terminate her visit Friday night. That is a drastic reaction to a social slight by a stranger and Brown's efforts to elicit from Lanik's

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[9] 473 U.S. at 682.

counselors an admission that she was inclined to so react met with singular lack of success.

Further, the defense's theory required the jury to believe that Brown's interest was solely professional and that Lanik initiated social interaction. That proposition was contradicted by the testimony of two other witnesses. Janet Svick, an assistant to a Texas state court judge, testified that Brown had telephoned her, like Lanik, on the pretext of conducting a survey of local social life. As with Lanik, Brown gave the conversation a personal spin. After several more calls, he convinced Svick to meet him at an address that he furnished. She arrived but changed her mind before she exited her car and left. Also, Pam Gibson, Brown's former girlfriend, testified that she had returned home from work one day to find Brown sitting at her dining room table with a telephone and a telephone book in front of him. The telephone book was opened to a page on which Brown had marked the names of apparently single women. Gibson challenged him; Brown offered no explanation.

Whatever assistance the police incident report might have provided Brown, we do not see a reasonable probability that it would have convinced the jury, in the context of the record as a whole, that Lanik was lying about the essential elements of the offense.[10] Brown has not shown a **Brady** violation.

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[10]Cf. **Derden v. McNeel**, 938 F.2d 605 (5th Cir. 1991), rev'd on rehearing en banc, 978 F.2d 1453, cert. denied, 113 S.Ct. 2928 (1992) (although the police radio log that the prosecution failed to produce could have been used to impeach key prosecution witnesses and to buttress the defense theory, it does not cast doubt on the defendant's involvement in the crime).

2. Ineffective assistance of counsel.

At trial Lanik testified over the objection of defense counsel to the emotional trauma that she suffered as a result of the rape. The Texas Court of Criminal Appeals found that the admission of this evidence was error because Brown did not dispute that Lanik had been raped but only that he was the rapist. It held, however, that the error was harmless because a psychologist called by the state gave similar testimony. In the absence of a contemporaneous relevancy objection to the psychologist's testimony, assignment of error on review was procedurally barred. Brown now contends that his trial attorney was ineffective for failing to make such an objection.

Ineffective assistance of counsel warrants reversal only if the defendant shows that (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different.[11] We do not consider the first prong of the inquiry because we conclude that counsel's failure to object does not undermine the reliability of the result of Brown's trial.

Brown's claim of deficient performance rests on his assertion that the only contested issue at trial was identity, rendering the psychologist's trauma testimony irrelevant and hence inadmissible. Accepting *arguendo* Brown's challenge to relevancy, it is apparent

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[11]**Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Sharp v. Puckett**, 930 F.2d 450 (5th Cir. 1991).

that the testimony could not have affected the outcome of the trial. The testimony of the psychologist did not tend to make it more or less likely that Brown was the rapist. Brown contends that the testimony induced sympathy for Lanik. This argument is not persuasive.

Brown's other objections to his trial attorney's performance are similarly meritless. Some fail because the alleged errors do not constitute deficient performance; as to the remainder there is no indication of prejudice.

Brown's objections to the testimony of the state's psychologist are procedurally barred.[12] His objections to Lanik's trauma testimony, which was cumulative to that of the psychologist, does not warrant habeas relief.[13]

AFFIRMED.

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[12]See **Johnson v. Hargett**, 978 F.2d 855 (5th Cir. 1992) (counsel error constitutes cause for a procedural default only when it rises to the level of an independent constitutional violation), cert. denied, 113 S.Ct. 1652 (1993).

[13]See **Carson v. Collins**, 993 F.2d 461 (5th Cir.), cert. denied, 114 S.Ct. 265 (1993).