

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-11112
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARIO ESCOBEDO, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:94 CR 236 1 P)

September 14, 1995

Before DAVIS, BARKSDALE and DEMOSS, Circuit Judges.

PER CURIAM:¹

Following his conviction on multiple bank robbery and related weapons offenses, Escobedo moved for a new trial on grounds that the government failed to provide him with exculpatory Brady evidence. We agree with the district court that even if the evidence was Brady material, the failure of the government to disclose the evidence was not material. We therefore affirm.

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Mario Escobedo, Jr., was accused of robbing two banks, with federally insured deposits, in east Dallas, Texas: Bank of America on February 2, 1994, and June 10, 1994, and Comerica Bank on May 11, 1994. Escobedo was also charged with using a firearm during each of the robberies.

The government presented a strong case against Escobedo. Four eye witnesses to the robberies identified Escobedo's photograph in a photographic lineup as the robber. Five witnesses, all of whom were tellers standing one to two feet from the robber, made in-court identifications of Escobedo as the robber and four of the witnesses variously described the robber as having a noticeable skin blemish. A tracking device the teller planted with the loot from the first robbery was found very near the apartment where Escobedo lived and where Escobedo was found at home shortly after the first robbery. Escobedo's live-in girlfriend placed Escobedo out of the apartment at the time of the first robbery, placed a handgun matching a description of the one used in the robbery in Escobedo's possession that morning and described Escobedo as nervous or edgy. Escobedo's alibi defenses were provided by his mother and her friend and were not particularly persuasive.

After the jury found Escobedo guilty on all counts, Escobedo learned that Gretchen Kingsley, a witness to the February 2 robbery, had written a note describing the robber to one of the investigating FBI agents. The note is not in the record but Ms. Kingsley apparently described the robber as having pitted skin or

"possibly having acne-scarred skin." Although Ms. Kingsley did not testify, Escobedo sought a new trial on grounds that prosecutors suppressed favorable evidence which would have altered the defense strategy.

The district court denied Escobedo's motion for a new trial.² We agree with the district court that in light of the strong evidence of Escobedo's guilt and the evidence of skin blemishes on the robber already before the jury, Ms. Kingsley's testimony would have been merely cumulative. Thus, assuming, without deciding, that the prosecution suppressed evidence favorable to the defense, we hold that this evidence was not material because it is highly

² The district court denied the motion on grounds that the evidence was not material. The court stated:

Escobedo argues that had he known of Kingsley's description of the robber, the "entire thrust of the defense case would have been the varying description." However, the defense was aware of the varying descriptions given by the witness (sic) who did testify, and this information was before the jury. Almost every eyewitness and investigator was questioned on this point by the defense. The Court also notes that not every witness recalled or noticed any type of skin blemish on the robber. These factors were thoroughly considered by the jury in light of the other evidence presented, and the jury found that Escobedo was the bank robber. The fact that five instead of four witnesses described a skin blemish on the robber is simply cumulative. The entire thrust of the defense case was the issue of identification, with the skin blemish descriptions being a large component of that issue. In light of all the evidence presented, the Court cannot find that had Kingsley's notes been disclosed, there is a reasonable probability that the outcome of the trial would have been different.

unlikely that, had it been produced, it would have affected the outcome of the trial.

AFFIRMED.