FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

185

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 25, 1987
vs.	)	
STEVEN MICHAEL ANDERSON,	)	6-425 85-1606
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Washington County (No. 1627-0485) - Robert Bates and James P. Rielly, Judges.

Defendant appeals from judgment and sentence entered on a jury verdict finding him guilty of assault causing bodily injury, interference with official acts resulting in bodily injury, and simple assault, contending the trial court abused its discretion and committed error with respect to numerous rulings. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.**

Emmit J. George Jr. and Jeannette M. Keller of Emmit J. George Jr. Law Office, Iowa City, for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and Gerald N. Partridge, County Attorney, for plaintiff-appellee.

Considered by en banc.

On April 18, 1985, the appellant, Steven Michael Anderson, was charged by trial information with operating a motor vehicle while intoxicated, interference with official acts resulting in bodily injury, and assault causing bodily injury. On March 6, 1985, he had been charged by complaint and affidavit with simple assault. Trial commenced on July 1, 1985. On July 3, 1985, the jury returned guilty verdicts on the charges of simple assault, interference with official acts resulting in bodily injury, and assault causing bodily injury. A verdict of not guilty was returned on the charge of operating a motor vehicle while intoxicated. On October 4, 1985, Anderson was sentenced to concurrent sentences of thirty days on the simple assault conviction and one year each on the remaining two convictions. This appeal followed. Unless otherwise noted herein, our review is for correction of errors at law. Iowa R. App. P. 4.

Prior to trial, Anderson filed a discovery motion seeking, inter alia, "the criminal records of all prosecution witnesses, if any exist, including but not limited to: [five named individuals]." This portion of the discovery motion was denied by the district court. Anderson contends this action by the district court denied him a fair trial. A fair trial in a fair tribunal is a basic requirement of constitutional due process. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 2d 942, 946 (1955); State v. Larmond, 244 N.W.2d 233, 235 (Iowa 1976). Anderson's claim is accordingly one of constitutional dimensions. Our review of such issues consists of an independent evaluation of the totality of the circumstances; this is equivalent to a de novo review. State v. Schubert, 346 N.W.2d 30, 32 (Iowa 1984); State v. Hatter, 342 N.W.2d 851, 854 (Iowa 1983).

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215, 218 (1963), the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates

due process where the evidence is material either to guilt or to punishment. We recognize that the case at bar is somewhat different from Brady in that here the district court ostensibly relieved the prosecution of any duty to produce the requested records when it denied Anderson's motion. Therefore, prosecutorial "suppression" is not at issue. We think, however, that a careful reading of Brady and its progeny shows that this distinction is not controlling. Such a reading discloses that it is the effect of the nondisclosed evidence on the accused's right to a fair trial and not the intentional act of suppression that is determinative of the due process issue. As the Brady court stated, the due process violation may occur "irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218. If the nondisclosure of the evidence results in constitutional error, it is because of the nature of the evidence, not the character of the prosecutor. United States v. Agurs, 427 U.S. 97, 110, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342, 353 (1976). Therefore, we believe that it is the objective unfairness of trying a criminal defendant without consideration of material "evidence favorable to the accused" which violates due process. The fact that the district court, and not the prosecutor, is responsible for the unfairness does not take the present case out of the ambit of the due process considerations which underly the Brady rule.

A number of courts have held that Brady imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence which is materially favorable to the accused either as direct or impeaching evidence. United States v. Pitt, 717 F.2d 1334, 1339 (11th Cir.), reh'g denied, 720 F.2d 1294 (1983), cert. denied, 465 U.S. 1068, 104 S. Ct. 1421, 79 L. Ed. 2d 746 (1984); Perkins v. LeFevre, 691 F.2d 616, 619 (2d Cir. 1982); United States v. Esposito, 523 F.2d 242, 248 (7th Cir. 1975), cert. denied, 425 U.S. 916, 96 S. Ct. 1517, 47 L. Ed. 2d 768 (1976); Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968),

cert. denied, 393 U.S. 1105, 89 S. Ct. 908, 21 L. Ed. 2d 799 (1969). This classification of evidence includes the criminal records of prosecution witnesses. Perkins, 691 F.2d at 619-20; Martinez v. Wainright, 621 F.2d 184, 186-89 (5th Cir. 1980); United States v. Quinn, 364 F. Supp. 432, 445 (N.D. Ga. 1973); United States v. Leichtfuss, 331 F. Supp. 723, 736 (N.D. Ill. 1971); see also, United States v. Auten, 632 F.2d 478 (5th Cir. 1980). Underlying these holdings is a fundamental concern that a criminal defendant receive a fair trial. Although a criminal defendant is entitled to no more than that, he or she surely must have no less. State v. Eads, 166 N.W.2d 766, 771 (Iowa 1969). The overriding interest of the State is not in obtaining convictions; rather, it is in seeing that justice is done. Agurs, 427 U.S. at 110-11, 96 S. Ct. at 2401, 49 L. Ed. at 354. As the Tenth Circuit Court of Appeals recognized in United States v. Miller, 499 F.2d 736, 744 (1974), under some circumstances the government's suppression of beneficial impeachment evidence affecting the credibility of a key prosecution witness may result in such unfairness as to violate due process.

In addition, the United States Supreme Court has held that the federal constitution secures a criminal defendant's right of cross-examination. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974). We think this includes the right to attempt to impeach the credibility of a witness by proving his conviction of a crime and by inquiring into facts showing any criminal act which might affect his character and tend to show that the witness is not worthy of belief. People v. Sumpter, 75 Misc. 2d 55, 58, 347 N.Y.S. 2d 670, 673 (N.Y. Sup. Ct. 1973). Long ago, our courts recognized that one of the rights of a jury trial is the right to have the credibility of witnesses determined by a jury. Graham v. Chicago & Northwestern Ry. Co., 143 Iowa 604, 615, 119 N.W. 708, 711 (1908). Generally, there are no limitations on the rule that the credibility of a witness is to be determined by the jury. State v. Frank,

298 N.W.2d 324, 329 (Iowa 1980). The trial court's discretion in limiting cross-examination, which we think was effectively employed here via that court's ruling on the discovery motion, should not be exercised so as to exclude matters vital and proper to the defense of the accused. State v. Rowe, 238 Iowa 237, 243, 26 N.W.2d 422, 425 (1947). The permissible subjects of the cross-examination include the witness's credibility, bias, or interest in the case. State v. Cuevas, 288 N.W.2d 525, 530 (Iowa 1980).

Relatedly, the United States Supreme Court has stated that when the reliability of a witness is potentially determinative of guilt or innocence, the nondisclosure of evidence affecting the witness's credibility falls within the due process obligations imposed by the constitution as interpreted in Brady. Giglio v. U.S., 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972); Commonwealth v. Jackson, 388 Mass. 98, 107, 445 N.E.2d 1033, 1041 (Mass. 1983); see also United States v. Montoya, 716 F.2d 1340, 1345-46 (10th Cir. 1983).

In People v. Howard, 89 Misc. 911, 919, 392 N.Y.S. 2d 558, 565 (Onondoga County Court 1977), a criminal defendant sought, through pretrial motion, a copy of the "rap sheet" or arrest record of the State's witnesses. As is the case in Iowa, state statute did not specifically provide for such discovery. In holding that these records should be disclosed to the defendant, the court summarized its concerns in the following manner:

> Thus the preparation of a defense includes, out of necessity, the preparation to cross-examine the witnesses offered by the prosecution and one's right to such cross-examination includes impeachment by proof of prior criminal convictions. Although the District Attorney's Office can readily obtain such information to impeach the defendant's witnesses, including the defendant himself if he chooses to testify, the defendant—through his attorney assigned or otherwise—does not have the accessibility or the funds in most cases to obtain such needed information to prepare for trial and properly defend [himself] . . . .

> Thus, to ignore the realization that such evidence is important and vital to a criminal case, be it for the defense in the preparation for trial or for the prosecution, is to shy away from reality.

See also, Leichtfuss, 331 F. Supp. at 736.

Likewise, in the case at bar, the State had the opportunity to turn Anderson's life into an open book by obtaining both his criminal record and the criminal records of his witnesses. Those it may use, subject to our rules of evidence, to attack their credibility. We believe the federal constitution entitles Anderson to an equal opportunity to obtain such data.

The State contends that the discovery requested by Anderson here is not mandated by Iowa Rule of Criminal Procedure 13(b)(2). We agree with this assertion but point out that it misses the point of both Anderson's claim and our holding. We have enforced today not a rule of discovery but, rather, a constitutional guarantee. The discretion afforded district courts by rule 13(b)(2) has no bearing on rights secured by our state and federal constitutions. Neither are we persuaded by the State's argument that our holding today violates Iowa Code section 692.3 (1985). That section provides that

> [a] peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate criminal history data outside the agency, received from the department or bureau, unless all of the following apply:
>
> a. The data is for official purposes in connection with prescribed duties of a criminal justice agency.
>
> b. The agency maintains a list of the persons receiving the data and the date and purpose of the dissemination.
>
> c. The request for data is based upon name, fingerprints, or other individual identification characteristics.

Initially, we think there is nothing in the nature of a prosecutor's compliance with a court-ordered discovery motion which runs afoul of any of the requirements

of this section. Clearly such compliance would be "for official purposes in connection with prescribed duties [i.e., prosecution of criminal defendants]" of the prosecutor. The prosecutor's office could easily keep the type of record mandated by subsection (b) of section 692.3. Finally, the request for data will be based upon name, i.e., those witnesses the state plans to call at trial. Moreover, we note that by virtue of its status as a constitutional guarantee, the rule of Brady must prevail over conflicting state statutes. Eley, 335 F. Supp. 353 (N.D. Ga. 1972).

Therefore, we hold today that criminal records of witnesses for the State may come within the ambit of the obligations imposed by Brady. Implicit in this holding is an acknowledgement that this will not always be the case. The parameters of the due process duty are fixed by the evidence's character as material evidence favorable to the accused. Brady, 373 U.S. at 87, 83 S. Ct. at 1197, 10 L. Ed. 2d at 218. If the criminal records at issue in a given case do not qualify under these criteria, their nondisclosure should not be grounds for reversal.

When Brady is invoked to obtain information useful for attacking the credibility of a prosecution witness, the information sought must have a definite impact on the credibility of an important prosecution witness in order for its nondisclosure to require reversal. United States v. Crockett, 534 F.2d 589, 601 (5th Cir. 1976). If, as in the present case, the prosecution's failure to produce was not deliberate, the test for reversal on appeal is whether the trial was not merely imperfect but was, rather, unacceptably unfair. Miller, 499 F.2d at 744. In order to render a trial unacceptably unfair, the evidence must be inherently significant and favorable to the defense. Id. The factors which we think should guide the resolution of this inquiry are the evidence's materiality and admissibility. Our central concern is that an accused be allowed the opportunity

for the trier of fact in a criminal case to fully and fairly evaluate the credibility of the State's witnesses. It follows from this that the nonproduction of evidence which, by virtue of our rules of evidence, may not be presented to the trier of fact, and which accordingly will be in no way favorable to the defendant, should not be grounds for reversal. See Iowa R. Evid. 609. In addition, in order for the evidence to be material, it must appear that its nonproduction affected the outcome of the trial. Fryer v. State, 325 N.W.2d 400, 407 (Iowa 1982).

The record before this court does not contain the criminal records of the witnesses produced by the State at the trial below. As a result, we are not able to determine whether their nonproduction requires reversal of the judgment and sentence imposed and a new trial. Accordingly, we remand this case to the district court with directions that an order issue requiring the State to produce any criminal records which it has in its possession for the witnesses it called at trial. Any such records should be submitted to the district court for a determination of their effect on the trial below, consistent with the views expressed in this opinion. See United States v. Deutsch, 475 F.2d 55, 58 (5th Cir. 1973).

As the district court, on remand, may find that Anderson's constitutional rights were not violated, we proceed to a consideration of Anderson's other claims.

Anderson contends the district court erred in denying his motion for a continuance, sought to enable his counsel to review deposition transcripts which had not become available until the morning of trial. The district court denied the motion based in part on its concern with the small number of potential jurors available and the accompanying possibility that a continuance would result in an inability to empanel a jury that afternoon.

Our district courts are accorded broad discretion in ruling on motions for continuance. State v. Ware, 338 N.W.2d 707, 714 (Iowa 1983). A continuance should be granted only if substantial justice would be more nearly obtained. State v. Sheffey, 234 N.W.2d 92, 94 (Iowa 1975). A district court's ruling on a motion for continuance will not be interfered with on appeal unless it clearly appears that the court abused its discretion and an injustice has resulted therefrom. State v. Grimme, 338 N.W.2d 142, 144 (Iowa 1983). In ruling on the motion, the district court may properly consider not just the interests of the State and the defendant in a speedy and fair trial, but also the orderly administration of the court's business. Id.

We do not think the district court abused its discretion in denying Anderson's motion. Following Anderson's motion, the prosecutor offered to furnish Anderson's counsel with copies of the deposition transcripts which he, Anderson's counsel, had not yet received. In addition, the prosecutor stipulated that, of the three witnesses whose depositions were at issue, only a specific witness whose deposition was approximately twenty-four pages long would be called on that day. The trial proceeded in that manner. We think there has been no showing made that the district court abused its discretion.

Anderson next argues that the district court erred in admitting irrelevant testimony. During the direct examination of one of the State's witnesses, the following exchange took place:

> Q. Were you glad to see the police arrive when they came with the way this guy was behaving? A. Yes.
>
> Q. Did you feel safer after they got there? A. Yes.

Anderson contends this testimony is irrelevant, prejudicial, and its admission requires a reversal. We disagree.

The admissibility of evidence is a matter within the discretion of the trial court. State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). Even where a trial court errs in its decision as to admissibility, reversal is not appropriate unless the complaining party was prejudiced by the error. State v. Ellis, 350 N.W.2d 178, 181 (Iowa 1984). To show prejudice, it must sufficiently appear that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice. Id.

In the case at bar, we think there has been no showing that Anderson was prejudiced by the testimony at issue, even assuming it was irrelevant. Although Anderson argues that the testimony tended to depict him as a dangerous individual and the cause of the witness's fear, our review of the testimony leads us to believe otherwise. Taken in context, the inquiry made by the prosecutor and the answers given thereto clearly refer to the behavior not of Anderson, but of Anderson's companion. As is obvious from a reading of the complete testimony, the actions of this companion were the cause of the witness's apprehension. Consequently, we think the testimony did not in any way paint Anderson either as a dangerous man or as the source of the witness's fear. We think Anderson was not prejudiced by the testimony.

Anderson's next contention is that the district court committed error in allowing hearsay testimony into evidence. This contention is based upon the following exchange which occurred during the direct examination of a State's witness:

> Q. And do you recall Eldridge saying anything to you as the police arrived? A. Yeah, he had looked at me and said -
>
> MR. GEORGE: Your Honor, object; calls for hearsay.
>
> THE COURT: Who was present at that time?
>
> MR. PARTRIDGE: Your Honor, only Mr. Eldridge, the police officers, and Mr. Baker. This is the matter that I spoke of under Hillshimer.
>
> THE COURT: All right. Overruled. He may answer.

A. Okay, when the police first walked in, then he said — asked me if I had called the cops on him.

Hearsay is an extrajudicial statement offered to prove the truth of the assertion. State v. Kern, 307 N.W.2d 22, 25 (Iowa 1981). An out-of-court utterance is not hearsay unless it contains an assertion of fact and is offered to prove the truth of that assertion. State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978). In light of these principles, we think the question which was asked of the witness and to which he testified is not properly classified as hearsay. This is because there is no assertion of fact inherent in the question. See Jones, 271 N.W.2d at 767. The district court's ruling with respect to its admissibility was not error.

In Anderson's next argument, he urges us to find error in the district court's admission into evidence of a complaint report completed by Washington County police. A review of the record reveals, however, that the report was never received into evidence. Accordingly, this contention is without merit. Cf. State v. Bair, 347 N.W.2d 416, 422 (Iowa 1984) (if "allegedly prejudicial evidence is not in the record, then there can be no valid allegation that defendants were prejudiced by it").

Anderson argues next that the district court erred in refusing to instruct the jury that the crime of assault causing bodily injury is a specific intent crime. The short answer to Anderson's claim here is that the crime of assault causing bodily injury is not a specific intent crime. State v. Brown, 376 N.W.2d 910, 912-15 (Iowa Ct. App. 1985). Accordingly, Anderson's argument is without merit.

Anderson's seventh point of contention alleges district court error in allowing testimony relating to an earlier altercation between himself and Officer Mark Whidden, one of the police officers whom Anderson had allegedly assaulted in the present case. This testimony was elicited from Anderson on cross-examination. Anderson contends this evidence was both irrelevant and prejudicial.

The State argues its admission was proper under Iowa Rule of Evidence 404(b).

The general rule is that "one crime cannot be proved by proof of another." State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979) (quoting State v. Schlak, 253 Iowa 113, 115, 111 N.W.2d 289, 291 (1961)). The purpose of the rule is to exclude from the jury's consideration evidence which has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question. Id. This rule is codified as Iowa Rule of Evidence 404(b). See Iowa R. Evid. 404(b), federal advisory committee's note. That rule reads as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The exceptions to this rule are based upon the relevancy of certain evidence to the proof of some fact or element in issue other than the defendant's criminal disposition. Cott, 283 N.W.2d at 326. The test of admissibility under an exception to rule 404(b) is two-pronged. First, the evidence must be relevant to one or more of the issues for which exceptions are recognized. State v. Walsh, 318 N.W.2d 184, 185 (Iowa 1982). Second, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Munz, 355 N.W.2d 576, 579 (Iowa 1984).

In the present case, we think the testimony at issue is relevant to a possible motive engendering Anderson's alleged assault on Officer Whidden. See 1 C. Torcia, Wharton's Criminal Evidence § 113 (1985) ("[i]n a prosecution for assault and battery, motive may be shown by prior threats, ill will, prior disputes, or prior attacks by the defendant upon the victim").

Given our determination of the evidence's relevance, we must next decide whether this relevance is substantially outweighed by the danger of unfair prejudice. Munz, 355 N.W.2d at 579. For purposes of this balance, "prejudice" refers to the likelihood of an undue tendency to suggest decision on an improper basis. See Iowa R. Evid. 403, federal advisory committee note. For us to reverse the district court's decision on this issue as an abuse of discretion, Anderson must show that the trial court's action was unreasonable in light of attendant circumstances. Cott, 283 N.W.2d 324, 329 (Iowa 1979) Anderson has failed to make this showing and his contention here must therefore be rejected.

In his eighth allegation of error, Anderson contends that the district court erred in allowing into evidence the rebuttal testimony of Officer Whidden. The testimony at issue dealt with the earlier altercation between Anderson and Officer Whidden about which Anderson had testified on cross-examination. Anderson argues that rebuttal evidence should be limited to evidence which in effect denies a fact which the adverse party has attempted to prove. In addition, Anderson contends that rebuttal evidence must be limited to that which rebuts evidence brought out on direct, as opposed to cross-examination of a previous witness. We think Anderson's conception of proper rebuttal evidence is far too narrow.

Although evidence which has no direct tendency to impeach, contradict, explain or otherwise rebut evidence is not admissible on rebuttal, the district court is allowed a good deal of discretion in determining the scope of proper rebuttal testimony. State v. Willey, 171 N.W.2d 301, 302 (Iowa 1969). A district court's ruling regarding the propriety of rebuttal evidence will be disturbed on appeal only upon a clear abuse of discretion. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978). Rebuttal evidence includes any competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence intro-

duced by the accused or which is brought out on his or her cross-examination. 23 C.J.S. Criminal Law § 1050(a) (1961).

We have examined the testimony at issue here and believe it to be a further explanation of the incident between Anderson and Officer Whidden and think that parts of the testimony contradict that earlier testified to by Anderson. No abuse of discretion on the part of the district court has been shown.

Anderson next argues that the district court erred in allowing Police Chief Beinke, who had testified earlier, to be present in the courtroom during closing arguments. Anderson argues that this violates the "rule on witnesses" which had been invoked. In addition, Anderson contends that Chief Beinke's presence prejudiced the jury.

The "rule on witnesses' is set out in Iowa Rule of Evidence 615. That rule provides, in pertinent part, that "[a]t the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, ..." The purpose of an order of exclusion is to lessen the danger of perjury. State v. Pierce, 287 N.W.2d 570, 574 (Iowa 1980).

In the present case, no possibility of perjury due to Chief Beinke's presence existed as all the evidence had been received and both sides had rested prior to Beinke entering the courtroom. Anderson urges that Chief Beinke's presence could lead the jury to conclude that his presence was required to protect them from Mr. Anderson, and that Chief Beinke's presence suggested to the jury that Anderson's guilt was a foregone conclusion and that it was only a matter of time until Chief Beinke returned Anderson to the jail. Suffice it to say that we are unpersuaded by these contentions.

Finally, Anderson contends that the district court erred in denying his motion for a new trial. Anderson, however, has failed to cite authority for this contention. Iowa Rule of Appellate Procedure 14(a)(3) provides in pertinent

part that "[f]ailure in [an appellate] brief . . . to cite authority in support of an issue may be deemed waiver of that issue." See also Bush v. Iowa District Court for Sac County, 369 N.W.2d 424, 425-26 (Iowa 1985). Accordingly, we find that Anderson has waived this issue on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

All judges concur, except Donielson and Sackett, JJ., who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent. I disagree with the majority's conclusion that the principles set forth by the United States Supreme Court in Brady v. Maryland are applicable in the present case. I would hold that the defendant's right to a fair trial was not violated by the trial court's denial of defendant's motion to force the State to reveal the criminal records of government witnesses.

I first question the majority's application of Brady to the present case. The heart of the Brady doctrine concerns "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342, 351 (1976). The Brady doctrine therefore applies in those instances where the prosecution has knowingly suppressed exculpatory evidence favorable to the accused. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215, 218 (1963). In the present case, we are not faced with the situation where the prosecution has suppressed exculpatory evidence favorable to the accused. Rather, in the present case, we are presented with a situation where the trial court, exercising its broad discretion in ruling upon the discoverable nature of requested information, denied the defendant's motion seeking discovery of the criminal records of all government witnesses. We will reverse a ruling thereon only when it appears that such discretion was exercised on grounds clearly untenable or clearly unreasonable. Ashmead v. Harris, 336 N.W.2d 197, 199 (Iowa 1983). This then should be our proper scope of inquiry. Though we must review the present case under the totality of circumstances standard because the defendant is alleging due process violations, we must not forget that it is the exercise of the trial court's discretion which we must review. Fryer v. State, 325 N.W.2d 400, 407 (Iowa 1982).

However, assuming for the moment that the majority's application of the principles enunciated in Brady are properly applied, I would find that the defendant's claim must fail under the Brady standard.

I, like the majority, look to the federal line of cases which have entertained the issue of whether the criminal records of government witnesses are of a discoverable nature. I initially note that in Hemphill v. United States, 392 F.2d 45, 48 (8th Cir. 1968), the Eighth Circuit Court of Appeals held that the government was not required to inform the defendant, prior to trial, of the criminal records of the government's witnesses. In Hemphill, the lower court had denied the defendant's request for the government to produce the criminal records of the witnesses pursuant to Federal Rule of Criminal Procedure 16, upon which our own Iowa Rule of Criminal Procedure 13 is based. 392 F.2d at 48. The Hemphill court noted that relief under the discovery rules is a matter within the sound discretion of the district court and is reviewable only for an abuse of discretion. Id. The Eighth Circuit has consistently applied this standard in United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976), and United States v. Finley, 571 F.2d 430, 432 (8th Cir. 1978). This standard has also been followed by a number of other federal courts. United States v. Battisti, 486 F.2d 961, 965 (6th Cir. 1973); United States v. Conder, 423 F.2d 904, 910 (6th Cir. 1970); United States v. Penix, 516 F. Supp. 248, 257 (W.D. Okla. 1981); Shaw v. Robbins, 338 F. Supp. 756, 757 (D. Maine 1972); United States v. Withers, 303 F. Supp. 641, 646 (N.D. Illinois 1969).

I do not disagree with the majority's interpretation of Brady insofar as it concludes that Brady imposes an obligation of disclosure on the prosecution when the information in the prosecutor's possession is favorable to the defendant. However, I disagree with the majority's apparent approval of a standard focusing more on the impact of the undisclosed evidence on the defendant's ability to

prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. In interpreting Brady, the United States Supreme Court in United States v. Agurs, 427 U.S. 97, 112-113, 96 S. Ct. 2392, 2401-02, 49 L. Ed. 2d 342, 354-55 (1976), specifically disfavored such a standard and stated that the crucial inquiry in cases such as the present is whether the omitted evidence sought to be discovered created a reasonable doubt of the defendant's guilt or innocence that had otherwise not existed. "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." 427 U.S. at 112-13, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355.

The majority correctly points out that the character of the evidence requested is dispositive. It is true that under some circumstances the government's suppression of beneficial impeachment evidence affecting the credibility of a prosecution witness may result in unfairness. See United States v. Miller, 499 F.2d 736, 744 (10th Cir. 1974). However, I believe there is a broad distinction between the exculpatory evidence in Brady and the evidence requested in the present case.

In Brady, the defendant had admitted his participation in a murder, but claimed that it was his accomplice who had actually committed the crime. 373 U.S. at 84, 83 S. Ct. at 1194, 10 L. Ed. 2d at 217. Prior to trial, defendant's counsel requested the prosecution to allow him to examine the accomplice's extra-judicial statements. Id. Several were shown to him, but one in which the accomplice actually confessed to the murder was withheld. Id. In holding that the suppression by the prosecution of the accomplice's statement violated due process, the Brady court opined that "[a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant."

Id. at 87-88, 83 S. Ct. at 1197, 10 L. Ed. 2d at 219 (emphasis added). I therefore read the opinion in Brady as encompassing evidence which would lead a jury to develop a reasonable doubt as to the defendant's guilt or innocence. I do not read Brady as encompassing every piece of evidence which might be deemed favorable to the accused, for surely much of the evidence in the hands of the prosecutor could be so interpreted. Such evidence must be material to the issue of defendant's guilt.

I find the language in Link v. United States, 352 F.2d 207 (8th Cir. 1965), to be particularly applicable to the present case. The Link court held that suppressed impeachment evidence requires a higher standard of materiality than would be imposed for evidence directly relevant to guilt. 352 F.2d at 212. The Link court held that the suppression of any evidence which is probative on the issue of guilt or innocence can constitute a denial of due process. Id., citing Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 215, 218 (1963). The Link court, however, went on to hold that:

> [a]s to evidence not of that character and having admissibility only for the purpose of impeachment or credibility attack, nondisclosure or suppression, to be violative of due process, would in our opinion, unless the situation is otherwise tainted, have to be of such inherent significant as to represent fundamental unfairness.

352 F.2d at 212.

The defendant in the present case does not argue that the prosecution has within its possession evidence which would exulpate him for the crime charged. Rather, the defendant argues that his due process rights were violated merely because he was denied evidence which would only have been used to attack the credibility of the State's witnesses. Upon a review of the entire record, I find no evidence to even suggest the existence of any criminal records regarding the witnesses to be called by the State. The present case is unlike

those situations in United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973), or United States v. Hibler, 463 F.2d 455 (9th Cir. 1972), wherein the prosecution failed to turn over evidence regarding a witness who basically constituted the government's whole case and where such evidence would be vital to the defendant's preparation of his defense. Rather, I perceive defendant's request to be more of a "fishing" expedition, rather than a request based on the existence of withheld exculpatory evidence which would raise a substantial probability that had such disclosure been made at trial, the jury may have developed a reasonable doubt as to defendant's guilt.

I further find that there was substantial evidence in the record to support the jury's verdict of guilty. I would therefore find that even assuming that the trial court did err in refusing to order the production of the State's witnesses' criminal records, if any, the defendant suffered no prejudice as a result of such error. I fail to see that there would be a "significant chance" that any potential criminal records would have induced a reasonable doubt in the jurors' minds, Evans v. Joning, 489 F.2d 470, 478 (8th Cir. 1973), even though the existence of such records were not known at the time of trial.

For all the above reasons, I would affirm the trial court's denial of the defendant's motion to produce the criminal records of the State's witnesses.

Sackett, J., joins this dissent.