

FILED

JAN 25 1979

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed January 25, 1979

vs.

)

CHAD D. HANNER,

)

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61563

Defendant-Appellant.

)

Appeal from Johnson District Court - Clinton E. Schaeffer, Judge.

Defendant appeals his conviction for rape in violation of § 698.1, The Code 1977.

Reversed and remanded.

Michael Megan, of Freed, Reisetter, Megan & Rohovit, of Iowa City, counsel for appellant.

Thomas J. Miller, Attorney General of Iowa, and Kermit Dunahoo, Assistant Attorney General, counsel for appellee.

Heard by Oxberger, C. J., Donielson, Snell and Johnson, JJ. Carter, J. takes no part.

PER CURIAM

Defendant Chad Dwight Hanner appeals his jury conviction for rape in violation of § 698.1, The Code, asserting that the trial court erred when it overruled his motion for new trial on the ground that the State suppressed exculpatory evidence. We reverse and remand for new trial.

The evidence in question was a statement by the complaining witness Veronica Larimer contained in a police report that defendant argued with her about money and gave her \$10.00 before intercourse. At trial there was no dispute that an act of sexual intercourse took place between defendant and Larimer. Defendant contended that the intercourse was consensual, and Larimer agreed to accept \$20.00 from defendant in payment. Larimer testified that she did not consent to intercourse, and that there was no discussion of money prior to intercourse. She did accept \$10.00 subsequently from defendant which she testified he had borrowed for her.

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972), non-disclosure or suppression of evidence favorable to the defense is tested against the following factors: (1) suppression by the prosecution after request by the defense; (2) favorable character of the evidence for the defense; and (3) materiality of the evidence. *Moore v. Illinois*, supra at 794-795. We find that the elements of this test have been met here.

The defendant filed a general motion for production of exculpatory material before trial. *Brady v. Maryland*, supra; *State v. Eads*, 166 N.W.2d 766 (Iowa 1969). The statements by Larimer were contained in a police report available to the prosecution but not disclosed to the defense. They were discovered by defense counsel when they were incorporated in the pre-sentence investigation report. The statements were potentially useful to the defense and could be considered favorable. *United States v. Crow Dog*, 532 F.2d 1182, 1191 (8 Cir. 1976). They offered support to defendant's theory of consent, if admitted at trial, and could be a valuable source of impeachment of the complaining witness, if denied.

The materiality of the statements must be evaluated in the context of the entire record. *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The facts as brought forth at trial indicate that the complaining witness and defendant

were together all day, had each been drinking steadily and had visited defendant's motel room at least three times between attempts to locate various acquaintances of Larimer from whom she could borrow money. At least \$10.00 did change hands. At the hearing on motion for new trial, the police officer who had written the report in question testified that the statement that defendant had given Larimer \$10.00 prior to intercourse was an error in transcribing. However, he testified that Larimer indicated to him that a discussion or argument concerning money occurred prior to intercourse, a statement she denied at trial. Where the evidence supporting guilt is tenuous or questionable, additional evidence even of minor importance may be material enough to warrant a new trial. *United States v. Agurs*, supra at 112. "The suppression, inadvertent or not, by the government of evidence favorable to the defense and affecting the credibility of a key prosecution witness may result in such inherent unfairness as to be violative of due process." *United States v. Harris*, 462 F.2d 1033, 1034 (10 Cir. 1972). We find that the trial court erred in overruling defendant's motion for a new trial and we reverse and remand for a new trial.

REVERSED AND REMANDED.