Cite as 2023 Ark. App. 330

ARKANSAS COURT OF APPEALS

DIVISIONS II, III & IV
No. CR-22-453

DALE BUCKLEY APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** May 31, 2023 APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT [NO. 30CR-19-427] HONORABLE CHRIS E WILLIAMS, JUDGE AFFIRMED

RITA W. GRUBER, Judge

A Hot Spring County jury found appellant Dale Buckley guilty of residential burglary under a theory of accomplice liability and sentenced him to fifteen years' imprisonment. In addition to challenging the sufficiency of the evidence, appellant argues that the circuit court abused its discretion by denying appellant's posttrial motion based on a *Brady/Giglio* violation; abused its discretion by admitting appellant's custodial statements; and erred by permitting a legally inconsistent verdict. We affirm on all points.

On November 27, 2019, at 7:45 p.m., Brody Gearhart was fatally shot in front of his fiancée, Hannah Oliver, and their two young children inside their home. On the day of the shooting, Charles George and appellant were hanging out and riding around. They ran into Korwan Keith and Duante Weaver, who went with them to McDonald's. The four men then met up with Terrance Hughes and Stavaris Balentine. After leaving McDonald's, Weaver told the group that Gearhart had some marijuana at his house. The group initially came up

with a plan to go to Gearhart's house to buy some marijuana, but the plan evolved into a plan to steal the drugs. All six men walked to Gearhart's house. Weaver knocked on the back door while the others ran to the front of the house. The front door was knocked down; one man ran into the bedroom; one man asked, "Where's the shit?"; Hughes shot Gearhart; and the men fled from the house.

Oliver was in the living room with her children when the men entered the house. She testified at trial that several men were in her living room, including Hughes and appellant. She identified Hughes as the shooter but said appellant just stood there. Oliver called 911, and the Malvern Police Department dispatched officers to the scene. Appellant and George ran to the Relax Inn, where appellant changed clothes.

During their investigation, officers were told that after the shooting, two suspects ran into room number 8 of the nearby Relax Inn. Officer Heath Dickson, a patrol sergeant with the Malvern Police, testified that when he arrived at room 8, he spoke to Eddie Watkins, who was renting the room. Watkins identified appellant and George as having recently been in his room. Dickson said they were free to leave at any time but asked appellant and George how long they had been in the room. Appellant told him he had been in the room since 6:00 p.m. Watkins told him that they had arrived in the room just before Dickson arrived. After reviewing surveillance footage from the motel, the officers were able to identify appellant walking to the Relax Inn around 8:41 p.m.

The police returned to the Relax Inn later that night, and Lieutenant Clay Coke spoke with appellant in the parking lot of the motel. Appellant told Coke that he arrived at

the Relax Inn around 6:00 p.m. and had not left. Coke also said appellant was free to leave. After talking for a few minutes, Coke left the parking lot to confer with the officers who had reviewed the surveillance videos, and he told appellant to "hang tight." Coke learned from the other officers that appellant had lied about being at the Relax Inn since 6:00 p.m. Due to the inconsistencies between appellant's statement and the footage placing him as arriving in the parking lot at 8:41 p.m., the police determined that they had probable cause to take appellant into custody on the charge of obstructing governmental operations during the course of an investigation.

Coke testified that after taking appellant into custody and transporting him to the police station, the detectives read appellant his *Miranda* rights, and appellant signed a form documenting he understood his rights. Afterwards, appellant made a recorded statement, which was ultimately excluded from evidence due to technical issues playing it at trial; however, Coke testified at trial *without objection* that in his post-*Miranda* statement, appellant said that he, George, Keith, Hughes, and an unidentified man had conspired to go to the victim's home to rob him and that appellant identified Hughes as the person who shot Gearhart. A motion to suppress the custodial statement was denied prior to trial.

Appellant was charged as an accomplice to first-degree murder arising out of committing or attempting to commit a felony; residential burglary; a sentence enhancement for engaging in violent criminal group activity; and a sentence enhancement for committing a felony in the presence of two minor children.

The jury trial commenced on September 30, 2021. Appellant's counsel moved to suppress appellant's custodial statement, arguing that being told to "hang tight" by Coke was an illegal detention because Coke lacked probable cause to detain him; therefore, his post-*Miranda* statement must be suppressed as fruit of the poisonous tree. The State responded that the collective knowledge of the police officers amounted to probable cause to arrest appellant before Coke told him to "hang tight" because the other officers knew at that juncture that appellant had lied about being at the Relax Inn. The circuit court denied the motion because appellant was not arrested when he was told to "hang tight" and that lying to the police was sufficient probable cause to arrest appellant for obstructing governmental operations. Although the recorded custodial statement was not admitted at trial, Coke testified regarding the content of the statement without objection.

Oliver testified at trial that appellant was inside the house when Hughes shot Gearhart. She said that she thought she told the officers at some point that appellant was inside the house. During appellant's counsel's cross-examination, Oliver admitted that she did not write appellant's name on a prior written statement and that during her testimony in an earlier related trial, she did not identify appellant as being inside the house. Appellant's counsel requested a bench conference concerning a potential *Brady* violation because counsel had not received any discovery from the State to suggest Oliver would testify at trial that appellant was inside the house. The State responded that nothing in its file indicated that appellant was inside the house with the shooter. The court recessed for lunch. The matter

was not raised or ruled on after returning from the recess, and appellant's counsel never requested any relief.

Appellant moved for a directed verdict at the close of the State's case, asserting that the evidence was insufficient to show that appellant acted alone or with any other person to attempt to or commit murder or residential burglary. Appellant argued that mere presence, acquiescence, or knowledge that a crime is being committed is not sufficient to prove accomplice liability. The court denied the motion. The defense rested without presenting any evidence. Appellant renewed his motion for a directed verdict, which was again denied.

The jury found appellant not guilty of first-degree murder in the presence of a child, but it found him guilty of residential burglary and committing a crime of violence while acting in concert with two or more persons. Appellant was sentenced to fifteen years in the Arkansas Department of Correction. A sentencing order was entered on October 8, which was amended on November 24.

On November 2, appellant filed a motion to set aside the verdict and/or dismiss due to an alleged violation of *Giglio/Brady*, as well as an amended motion, which included a motion for reconsideration. The State moved strike appellant's amended motion, arguing that appellant's first motion was deemed denied one day prior to the filing of the amended motion. On April 6, 2022, the circuit court entered an order granting the State's motion to strike and denied appellant's motion for reconsideration due to lack of jurisdiction.

Appellant brings this appeal from the sentencing orders and the circuit court's denial of his posttrial motions. We granted appellant's motion to file a belated appeal, and this appeal ensued.

I. *Sufficiency of the Evidence*

When an appellant challenges the sufficiency of the evidence on appeal, the court addresses the sufficiency argument prior to a review of other alleged trial errors. *Holland v. State*, 2020 Ark. App. 434, at 11–12. When the sufficiency of the evidence is challenged in a criminal conviction, the evidence is viewed in the light most favorable to the verdict, and only the evidence supporting the verdict is considered. *Holland v. State*, 2017 Ark. App. 49, at 3–4, 510 S.W.3d 311, 313. We will affirm if the verdict is supported by substantial evidence—evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* at 4, 510 S.W.3d at 313. Weighing the evidence, reconciling conflicts in the testimony, and assessing credibility are all matters exclusively for the trier of fact. at 4, 510 S.W.3d at 314. The jury may accept or reject any part of a witness's testimony, and its conclusion regarding credibility is binding on the appellate court. *Id.* Finally, circumstantial evidence can support a conviction; whether it does so is for the jury to decide. *Blakes v. State*, 2021 Ark. App. 32, at 3, 615 S.W.3d 768, 770.

"A person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment." Ark. Code Ann.

§ 5-39-201(a)(1) (Repl. 2013). Thus, the offense of residential burglary requires proof of two elements: (1) that the person entered or remained unlawfully in the residence and (2) that the person did so with the purpose to commit a felony in that residence. *Holland*, 2017 Ark. App. 49, at 4, 510 S.W.3d at 314 (citing *Holt v. State*, 2011 Ark. 391, 384 S.W.3d 498). The statute does not require that property actually be stolen. *Navarro v. State*, 371 Ark. 179, 187, 264 S.W.3d 530, 536 (2007).

A person becomes a party to an offense and is criminally liable for the conduct of another person if the "person is an accomplice of another person in the commission of an offense." Ark. Code Ann. § 5-2-402(2) (Repl. 2013). "A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person: . . . [a]ids, agrees to aid, or attempts to aid the other person in planning or committing the offense." Ark. Code Ann. § 5-2-403(a)(2) (Repl. 2013). When two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both; Arkansas law makes no distinction between the criminal liability of a principal and an accomplice. *Wilson v. State*, 2016 Ark. App. 218, at 6, 489 S.W.3d 716, 719–20. In *Wilson*, the court set forth factors relevant to determining whether a person is an accomplice, which included the presence of the accused near the crime; the accused's opportunity to commit the crime; and the accused's association with a person involved in the crime in a manner suggestive of joint participation. *Id.* at 6, 489 S.W.3d at 720.

Appellant was charged as an accomplice to residential burglary. For reversal, he claims that there was insufficient proof that he went to the victim's home with the purpose to commit theft of property inside the residence or that he was an accomplice to residential burglary. He contends that there was no evidence produced that he tried to take anything from the residence or that anything was stolen. He states that his mere presence at the scene of the crime does not render him an accomplice.

A review of the evidence at trial in the instant case reveals substantial evidence to support appellant's conviction. The testimony of Korwan Keith and Charles George as well as appellant's own statement to Lieutenant Coke clearly established that appellant and the other men went to Gearhart's house with the intent to steal marijuana. The law does not require that property must actually be taken to satisfy the offense. *See Navarro*, *supra*. There was ample evidence from statements and testimony that the six men concocted a plan to purchase marijuana that turned into a plan to steal marijuana, and appellant confirmed this in his statement to Coke. George and appellant each placed appellant on the porch steps of the house with Hughes when the event began. Oliver testified that she heard a knock on the back door; the front door was thrown open and people entered the house; someone entered the bedroom as if looking for something; and someone asked, "Where's the shit?" Hughes[1] shot and killed Gearhart in the midst of this plan to steal some marijuana. Appellant and George fled the scene and went to the Relax Inn where appellant changed clothes. Appellant

[1]Hughes was convicted of first-degree murder and aggravated residential burglary in a separate case, *Hughes v. State*, 2022 Ark. App. 453, 655 S.W.3d 312.

initially denied being at Gearhart's house and leaving the Relax Inn after 6:00 p.m.; however, in his statement to Coke, appellant later admitted being at Gearhart's house when Hughes shot the victim. This is sufficient evidence to place appellant at the crime scene with the intent to take marijuana from the house.

While it is true that appellant's mere presence at the crime scene does not make him an accomplice as a matter of law, *see Wilson v. State*, 365 Ark. 664, 667, 232 S.W.3d 455, 459 (2006), substantial evidence exists that appellant aided or agreed to aid another person in planning or committing the offense of residential burglary, thereby rendering him an accomplice. It is irrelevant here whether appellant entered the house or not because the other men who planned the robbery clearly entered the house and searched for marijuana, and accomplices are criminally liable for each other's conduct. *See Wilson*, 2016 Ark. App. 218, at 6, 489 S.W.3d at 719–20. In conclusion, we hold that substantial evidence supports appellant's residential-burglary conviction.

II. *Alleged* Brady/Giglio *Violation*

Appellant bases his alleged *Brady* violation on the State's failure to produce a handwritten statement by Oliver, the victim's fiancée, who was present when the shooting occurred. This argument is not preserved for review. We will not review a matter on which the circuit court has not ruled. To preserve an issue for appellate review, the burden of

obtaining a ruling is on the movant. *Alexander v. State*, 335 Ark. 131, 133–34, 983 S.W.2d 110, 111 (1998).

Oliver testified at trial that appellant was inside the house on the night that Hughes shot Gearhart. Thereafter, appellant's counsel cross-examined Oliver extensively. The circuit court and counsel discussed in a bench conference whether Oliver had made a contradictory statement. After Oliver's testimony concluded, the following exchange occurred:

DEFENSE COUNSEL: Your Honor, today, September 29, 30th, whatever today is, is the first time Defense has ever been provided any information that Hannah Oliver identified Dale Buckley as being in her home that night. That's never been supplied to me. She's testified that she gave that information to law enforcement and law enforcement has never written a report to that effect that is in my possession. And if I, if the State has that information, I'm entitled to that.

THE COURT: You are.

DEFENSE COUNSEL: And *I think that's highly, highly inculpatory evidence that may have made a decision about whether we proceeded today*.

THE COURT: Well –

DEFENSE COUNSEL: I don't have, I didn't have that. *And I believe that is a direct Brady violation, Your Honor.*

THE COURT: *It very well may be. But it's not right now*. If they've got that information, they'll disclose it to you. And if they don't, then that makes a pretty good argument at the end of this case. So, you know, let's just see what you've got. Do you have anything that shows that she identified Dale Buckley at all in this case . . . through all the stuff you researched concerning this case involving the investigation from the Malvern Police Department or other?

PROSECUTOR: The only statement I ever heard her talk about was –

THE COURT: So, [this is] the first time she ever said that she saw him?

PROSECUTOR: . . . [E]*verything that I have in my notes says that she did not identify Dale Buckley in that living room.*

THE COURT: Mmmm.

PROSECUTOR: Now, that is her testimony today. She explained her testimony today. That is what they cross examined her on –

THE COURT: I don't think she's explained . . . this being the first time she disclosed it, because each time she hedged around it. And I wrote down what she was saying. So, you know, I'm just asking, I think they're asking a different question. They're asking . . . does the State of Arkansas have anything in all the investigatory file that this young lady, the young lady, Ms. Oliver, has ever said that Dale Buckley was . . . at her house or in her house anywhere in any of your information? They say they don't have it. *But if you've got it then it could be a Brady. It could be a mistrial.*

PROSECUTOR: Could we have just a moment, Your Honor?

DEFENSE COUNSEL: We can deal with [it] after lunch, give them a chance to look into it.

THE COURT: Sure. Give you time to look. I'll see y'all after lunch. What time is it?

(*PRIOR TO the jury returning to the courtroom:*)

PROSECUTOR: Your Honor, may we have a moment to visit with counsel?

THE COURT: Sure.

(*THEREUPON, the jury returned to the courtroom and the trial continued as follows:*)

THE COURT: The attorneys stepped out for a minute to talk. Mr. Murphy, would you step out and get your co-counsel?

PROSECUTOR: Yes, Your Honor.

THE COURT: You may call your next witness.

PROSECUTOR: Call Dillon Ledbetter.

(Emphasis added.)

At that point in the trial, no motion for a mistrial or any other request for relief was made. No objection was made or renewed, and no ruling was obtained. It is well settled that an appellant must obtain a ruling on his or her argument to preserve it for appeal. *See Alexander*, *supra*. Here, as in *Alexander*, the court's statement that the matter "very well may be [a *Brady* violation] [b]ut it's not right now" was clearly a conditional ruling, and the burden was on appellant to obtain a ruling; and "matters left unresolved are waived and may not be raised on appeal." *Alexander*, 335 Ark. at 133–34, 983 S.W.2d at 111. Accordingly, the *Brady*-violation objection was not preserved at this point in the trial, and certainly no ruling was obtained at that juncture.

Appellant's counsel also touched on the issue of the unseen statement in the directed-verdict motion, but only in requesting Oliver's testimony be given little weight or credibility without any reference to a *Brady* violation. Because there was not a specific objection made at trial and therefore no ruling on any *Brady* objection, the issue may not be raised on appeal.[2] *See Alexander*, *supra*. We hold that appellant failed to preserve his argument. However, even if it had been preserved, we would affirm because there is no prejudice under *Brady* and no reasonable probability that the outcome of the trial would have been different had appellant's counsel been provided with a written statement by Oliver.

[2]To the extent appellant raised the issue for the first time in his motions for posttrial relief, the objection is untimely. In order to preserve an issue for appeal, it must be presented to the circuit court at the earliest opportunity, and "a motion for a new trial cannot be used as an avenue to raise new allegations of error that have not be raised and preserved at trial." *Campbell v. State*, 2017 Ark. App. 340, at 9, 525 S.W.3d 465, 471.

On November 2, 2021, appellant filed a posttrial motion to set aside the verdict and/or dismiss due to a violation of *Giglio/Brady*. In the motion, appellant's counsel stated that on or about October 5, counsel sent a request via electronic correspondence to the Malvern Police Department under the Arkansas Freedom of Information Act of 1967, Ark. Code Ann. §§ 25-19-101 et seq. (Repl. 2014 & Supp. 2021) ("FOIA"). Counsel claimed that the response showed that the State failed to disclose several items of discovery—most importantly, Oliver's handwritten statement in which she did not identify appellant as one of the suspects who entered her home. Appellant did not attach Oliver's purportedly withheld statement or any other evidence of, or related to, the allegedly withheld materials. The State filed a request that appellant "file the specific pieces of evidence as exhibits that [appellant] alleges was not disclosed to them."

On December 28, 2021, appellant filed an amended motion to set aside the verdict and/or dismiss due to violation of *Giglio/Brady or, alternatively*, motion for reconsideration. Despite an attached itemized list of evidence obtained through the FOIA request created by appellant's counsel, the specific evidence asserted as the basis for appellant's *Brady* violation was not provided. On December 29, 2021, the State moved to strike appellant's amended motion, arguing that appellant's first motion, which was filed November 2 but followed by the amended sentencing order filed on November 24, was deemed denied on December 27.

The matter of granting or denying a new trial lies within the sound judicial discretion of the circuit court, whose action will be reversed only upon a clear showing of abuse of that discretion or manifest prejudice to the defendant. *Walden v. State*, 2012 Ark. App. 307, at

12, 419 S.W.3d 739, 745–46. Appellant had the duty of proving a *Brady* violation, and he failed to establish that he was prejudiced based on the facts before us.

The Supreme Court of the United States in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." In order to prove that the failure to provide Oliver's alleged written statement constituted a *Brady* violation, appellant must establish three elements: (1) the evidence at issue must be favorable to him, either because it is exculpatory or because it can be used to impeach a witness; (2) the evidence must have been suppressed by the State (willfully or even inadvertently); (3) and some prejudice must have ensued. *Graham v. State*, 2019 Ark. App. 88, at 8, 572 S.W.3d 29, 34.

In *Strickler v. Greene*, the Supreme Court stated: "It is the third component—whether petitioner has established the prejudice necessary to satisfy the 'materiality' inquiry—that is the most difficult element of the claimed *Brady* violation in this case." 527 U.S. 263, 282 (1999); *see also Isom v. State*, 2018 Ark. 368, at 4, 563 S.W.3d 533, 538. "Evidence is material—and its suppression prejudicial—if there is a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Harper v. State*, 2020 Ark. App. 4, at 7–8, 592 S.W.3d 708, 713 (citing *Isom*, 2018 Ark. 368, at 4, 563 S.W.3d at 538). When considering a *Brady* violation, we look at the significance of the evidence that was alleged to have been withheld weighed against the totality of the evidence to determine if the evidence at issue would have been such as to have prevented

rendition of the judgment had the evidence been available at the time of trial. *Smith v. State*, 2015 Ark. 188, at 5, 461 S.W.3d 345, 350 (per curiam) (citing *Goff v. State*, 2012 Ark. 68, 398 S.W.3d 896). The question is not whether the defendant would more likely than not have received a different verdict with the evidence but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *United States v. Bagley*, 473 U.S. 667, 678 (1985); *see, e.g.*, *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir. 2005) ("The critical question, however, is whether the defendant received a trial resulting in a verdict worthy of confidence."). When the State fails to provide information, "the burden is on the defendant to show that the omission was sufficient to undermine confidence in the outcome of the trial." *Lee v. State*, 340 Ark. 504, 509–10, 11 S.W.3d 553, 556 (2000).

Even if this court were to hold that appellant met the first two *Brady* elements, appellant has failed to establish the third element—the prejudice necessary to fulfill the materiality-analysis inquiry. We cannot say that there is a reasonable probability that the results of appellant's trial would have been different had a written statement by Oliver been disclosed.

Here, appellant's counsel cross-examined Oliver extensively on the subject and called Oliver's credibility into account. Appellant's counsel specifically questioned Oliver about the inconsistent statement as follows, in pertinent part:

> OLIVER: . . . I was, yeah, I was kept at the police station for a little bit that night.

DEFENSE COUNSEL: And so you gave a statement at the police station.

OLIVER: I wrote a statement.

DEFENSE COUNSEL: Okay. *You wrote a statement. And in that statement did you write Dale Buckley's name?*

OLIVER: Mmm-mmm (*shakes head side to side*).

DEFENSE COUNSEL: Okay. *But you're saying today that you gave a statement, and you identified Dale Buckley.*

OLIVER: I *told* that he was there, yes.

DEFENSE COUNSEL: Okay. Do you understand the penalty of perjury?

OLIVER: No. I don't know what that is.

DEFENSE COUNSEL: Okay. Perjury is when you lie under oath.

OLIVER: Okay.

DEFENSE COUNSEL: And do you understand that you can be charged with a crime for being dishonest?

OLIVER: Yes. Most definitely.

DEFENSE COUNSEL: And you would agree that you've testified, and this is your second time testifying.

OLIVER: Yes.

DEFENSE COUNSEL: And in that previous testimony did you identify *Dale Buckley as being in your home?*

OLIVER: *No.*

DEFENSE COUNSEL: Okay. And you gave a statement to Detective Coke on January 3rd and then you gave a statement to Officer Ledbetter on November 27th.

OLIVER: Mmm-hmm.

DEFENSE COUNSEL: *And you never wrote Dale Buckley's name down.*

OLIVER: *No.*

DEFENSE COUNSEL: But you're saying you –

OLIVER: I saw him in my house.

DEFENSE COUNSEL: You saw him in your house –

OLIVER: Yes, ma'am. I one hundred percent saw him in my house.

DEFENSE COUNSEL: But you never –

OLIVER: But I don't, I don't know why if I didn't tell the cops I didn't know. Like, I thought, I don't know what I thought. All I know is I saw him in my house one hundred percent. He was just standing there. No, he didn't pull a trigger. No, he didn't tell me to get my head down. But he was there standing there in my living room while that happened.

DEFENSE COUNSEL: Okay. And you testified you kept your head down the entire time.

OLIVER: After I said, please don't, my son, my daughter, I had a good three seconds to look who was in my house. I said, please don't, my son, my daughter, please don't, and put my head down. I saw everybody that was in my house.

(Emphasis added.) Appellant was able to question Oliver at length and point out her prior inconsistent statements, stating that she did not identify appellant as being inside the house in writing and that she did not place him inside the house in her testimony in the Hughes trial. Oliver's testimony was clear that she thought she had identified appellant as being inside the house only *verbally* when speaking with officers, but not in a written statement. Oliver admitted that she was giving inconsistent testimony.[3] *See Harper*, 2020 Ark. App. 4,

[3]It is particularly troubling that appellant has not produced Oliver's written statement that forms the basis of this alleged *Brady* violation when counsel claims he physically possesses the statement through his FOIA request made prior to seeking postconviction

at 10–11, 592 S.W.3d at 715; *see also Maiden v. State*, 2014 Ark. 294, at 9, 438 S.W.3d 263, 270 (recognizing that "once a witness acknowledges having made a prior inconsistent statement, the witness's credibility has been successfully impeached. In other words, '[a]n admitted liar need not be proved to be one.'").

The dissent concludes that Oliver's testimony at trial placing appellant *inside* the house was one of the key evidentiary pieces that placed him at the scene with the shooter. We disagree. Looking at the entirety of the evidence would hold that there was substantial evidence placing appellant *at* the scene as an accomplice, even excluding Oliver's testimony. Appellant certainly could have used a conflicting written statement to further impeach Oliver during her testimony; however, she had already acknowledged having made a prior inconsistent statement, successfully impeaching her own credibility. Thus, as in *Maiden*, *supra*, appellant was not denied the opportunity to call Oliver's veracity into question and to challenge her credibility before the jury. Furthermore, Oliver's testimony that appellant was inside the house was not the only evidence supporting appellant's conviction as an accomplice to residential burglary.

Appellant has not established that the allegedly undisclosed evidence would have altered the outcome of the trial; thus, he failed to demonstrate that the evidence was material and its suppression prejudicial in order to meet the third component of a *Brady* violation.

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relief; yet he did not include it in his posttrial motion or produce a record that included it. Outside of Oliver's testimony and the information discussed in the bench conference, we have nothing to suggest what the statement said or how prejudicial it may or may not have been. Generally, only an inconsistent statement would be admissible.

III. *Appellant's Custodial Statement*

Appellant argues that the court abused its discretion in denying his pretrial motion to suppress his statement obtained after officers from the Malvern Police Department questioned him in a custodial interview. Appellant contends that Lieutenant Coke illegally detained him without probable cause when Coke questioned him in the parking lot of the Relax Inn by instructing him to "hang tight." He asserts his subsequent arrest was unlawful, and any statements made after the time that he was illegally detained must be suppressed because they are fruit of the poisonous tree.

In reviewing a denial of a motion to suppress evidence, this court conducts a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Moody v. State*, 2014 Ark. App. 618, at 1–2, 446 S.W.3d 652, 653. We defer to the superiority of the circuit court to evaluate the credibility of witnesses who testify at a suppression hearing. *Id.* at 2, 446 S.W.3d at 653. We reverse only if the court's ruling is clearly against the preponderance of the evidence. *Id.*

A law enforcement officer may arrest a person if the officer has reasonable cause to believe that person has violated the law in the officer's presence. Ark. R. Crim. P. 4.1(a)(iii). Reasonable cause exists where facts and circumstances, within the arresting officer's knowledge and of which he has reasonably trustworthy information, are sufficient within themselves to warrant a man of reasonable caution to believe that an offense has been committed by the person to be arrested. *Champlin v. State*, 98 Ark. App. 305, 313, 254

S.W.3d 780, 786–87 (2007). Probable cause to arrest without a warrant also exists when facts and circumstances are within the collective knowledge of the arresting officers, which is reasonably trustworthy and sufficient to warrant a man of reasonable caution to believe that an offense has been committed by the person to be arrested. *Friend v. State*, 315 Ark. 143, 147, 865 S.W.2d 275, 277 (1993). Such probable cause does not require that degree of proof sufficient to sustain a conviction; however, a mere suspicion or even "a strong reason to suspect" will not suffice. *Id.* The assessment of probable cause is based on factual and practical considerations of prudent men rather than the discernment of legal technicians. *Roderick v. State*, 288 Ark. 360, 363, 705 S.W.2d 433, 435 (1986). It is based on the officers' knowledge at the moment of the arrest. *Id.* at 364, 705 S.W.2d at 436 (citing *Beck v. Ohio*, 379 U.S. 89 (1964)).

The supreme court has enumerated the following three separate categories involving encounters with police:

> The first and least intrusive category is when an officer merely approaches an individual on a street and asks if he is willing to answer some questions. Because the encounter is in a public place and is consensual, it does not constitute a "seizure" within the meaning of the fourth amendment. The second police encounter is when the officer may justifiably restrain an individual for a short period of time if they have an "articulable suspicion" that the person has committed or is about to commit a crime. The initially consensual encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. The final category is the full-scale arrest, which must be based on probable cause.

Fowler v. State, 2010 Ark. 431, at 4, 371 S.W.3d 677, 680–81 (citations omitted).

Appellant's arrest resulted from the following circumstances. Officer Dickson first encountered appellant in room 8 of the Relax Inn, where he went following a tip that two suspects had fled there. He spoke with appellant and George to figure out what time they made it to the room. Appellant told Dickson that he had been at the room since 6:00 p.m. As Dickson and other officers later reviewed the surveillance footage from McDonald's and the Relax Inn, it became apparent that appellant had lied when he told Dickson he had been in the motel room since 6:00 p.m. While the other officers were reviewing the footage, Coke was talking to appellant in the parking lot of the Relax Inn. Appellant told Coke that he had been at the motel since 6:00 p.m. and had not left at any point. The conversation between appellant and Coke lasted approximately ten to fifteen minutes. Coke told appellant to "hang tight" while he conferred with the officers who reviewed the surveillance tapes. Coke testified that when he told appellant to "hang tight," he did not have probable cause to arrest appellant, but after he was informed by the reviewing officers that appellant had lied about his whereabouts, he did have probable cause to make the arrest. At that point, Coke placed appellant under arrest for obstructing governmental operations. At the police station, Coke read appellant his *Miranda* rights, after which he initialed and signed the form indicating he understood his rights. Appellant then made a statement admitting that he was part of a group that planned and then went to Gearhart's house to "hit a lick" and identifying Hughes as the shooter.

Reviewing the encounters with police under the categories set forth in *Fowler*, *supra*, Coke's questioning of appellant in the parking lot fits into the first category because it was

in a public place and consensual and thus was not a "seizure" within the meaning of the fourth amendment. The encounter likely moved into the second category after Coke asked appellant to "hang tight," but at that point, the collective knowledge of the police amounted to an articulable suspicion that appellant had committed and was committing the crime of obstructing governmental operations,[4] thereby justifying the stop for a brief time to investigate further. Finally, Coke had probable cause to arrest appellant after confirming with the other officers that appellant was lying in the course of the investigation; thereby, he was knowingly obstructing, impairing, or hindering the performance of the police investigation.

For the foregoing reasons, the circuit court did not abuse its discretion in denying the motion to suppress.

IV. *Inconsistent Verdict*

Appellant argues that the jury's verdict was inconsistent because he was acquitted of the first-degree-murder charge, which is legally and factually inconsistent with a finding of guilt on the residential-burglary charge. Because appellant failed to raise this argument below, we will not consider it. *See Fletcher v. State*, 2014 Ark. App. 50, at 5. We hold that appellant's argument is not preserved for appeal.

Affirmed.

[4]"A person commits the offense of obstructing governmental operations if the person . . . [k]nowingly obstructs, impairs, or hinders the performance of any governmental function[.]" Ark. Code Ann. § 5-54-102(a)(1) (Repl. 2016).

BARRETT, THYER, WOOD, HIXSON, and BROWN, JJ., agree.

ABRAMSON, VIRDEN, and MURPHY, JJ., dissent.

MIKE MURPHY, Judge, dissenting. I disagree with the majority that this case should be affirmed. I would reverse and remand because I believe a *Brady* violation occurred, warranting a new trial.

I agree with the majority that the evidence on this record is sufficient to convict Buckley of residential burglary, but I think that, had Buckley had access to the wrongfully withheld statement, there is a chance that the outcome of the trial could have been different. At a minimum, my confidence in the outcome of the trial is undermined.

At trial, Oliver's testimony was one of the key evidentiary components that placed Buckley at the scene of the burglary. She said that she knew Buckley from around town, and he was in her house when Hughes shot Gearhart. She did not think she wrote a statement to law enforcement that had names in it, but she was sure that she had told law enforcement at some point before trial that Buckley was in her home. At trial she testified that "I saw him in my house one hundred percent."

Following Oliver's testimony, during which she was extensively cross-examined about her statement, Buckley's counsel asked for a bench conference concerning *Brady* because counsel had never received anything from the State to indicate that would be her statement at trial. The prosecutor stated that "everything I have in my notes says that she did not identify Dale Buckley in that living room." Defense counsel asserted a *Brady* violation, and a recess was taken for the State to review its files. After recess, nothing further was developed

on the record on the matter, but after the sentencing order was entered, Buckley filed a motion to set aside the verdict alleging the State withheld evidence in violation of *Brady*.

In that motion, Buckley explained that, after trial, he sent a letter to the Malvern Police Department pursuant to the Freedom of Information Act requesting the investigative file for Gearhart's murder. In response, he received Oliver's handwritten statement in which she did not identify Buckley as one of the men inside her house. Buckley argued that Oliver's written statement to police contradicted her testimony at trial, where she stated that she told police that Buckley was inside her house at the time of the murder. This statement, according to Buckley, could have been used to impeach Oliver, and the State improperly failed to disclose it. The motion was deemed denied.

The majority first explains that the issue, however, is not preserved. I firmly believe this is incorrect. Sure, to preserve an issue for appeal, a defendant must object at the first opportunity, *Vaughn v. State*, 338 Ark. 220, 225, 992 S.W.2d 785, 787 (1999), but I think that the posttrial motion *was* the first genuine opportunity to raise the issue. This record indicates that it was only *after* the FOIA-requested information was provided to the defense from the police that Buckley was able to know with certainty that a *Brady* issue actually existed. A posttrial motion is a perfectly acceptable vehicle to raise a *Brady* issue when suppressed evidence favorable to the accused is uncovered *after* the trial. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003). Moreover, a deemed denial of that motion creates a reviewable ruling. *Id.*

In fact, in *Smith*, *supra*, virtually the same thing occurred: subsequent to the trial, defense counsel filed a request under the Arkansas Freedom of Information Act with both the prosecutor's office and the Arkadelphia Police Department. Upon receiving a response to the requests, defense counsel discovered documents that he was not given prior to trial. Counsel filed a motion for a new trial alleging exculpatory evidence was not provided to the defense, but that motion was deemed denied. The supreme court determined that the issue was properly before it and reached the merits of Smith's arguments on direct appeal. Accordingly, I would hold that Buckley's motion for new trial was adequate to place the issue before this court for a review on the merits.

Tacitly acknowledging that preservation is a point of contention, the majority explains that even if the point were preserved, Buckley did not demonstrate prejudice sufficient to warrant a new trial. I again disagree.

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, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). There are three components to a *Brady* violation: (1) the evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. *Lacy v. State*, 2010 Ark. 388, at 24–25, 377 S.W.3d 227, 241.

The remedy for the suppression of *Brady* material is a new trial where the suppressed evidence would have been "material" to the defendant's claim of innocence. *Strickler v. Greene*, 527 U.S. 263, 264 (1999). The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, that is, a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). We review a trial court's denial of a Rule 33.3 motion for a manifest abuse of discretion. *Taffner v. State*, 2018 Ark. 99, at 14, 541 S.W.3d 430, 438.

Buckley argues that the State failed to disclose Oliver's written statement to police in which she did not identify him as one of the men inside her house, despite his discovery request. This was clearly evidence that should have been disclosed pursuant to *Brady*. The State is obligated to make timely disclosures of all evidence that even tends to negate guilt. Ark. R. Crim. P. 17.1(d). Evidence in the possession of law enforcement is imputed to the State for *Brady* purposes. *See Bienemy v. State*, 2016 Ark. 312, 498 S.W.3d 288. Oliver's testimony was a cornerstone of the State's case. Without it, the rest of the evidence tying Buckley to the burglary seems considerably thinner: two accomplices who had taken plea deals in exchange for their testimony and a secondhand account of Buckley's statement to the police (because the actual recording of the statement was ultimately excluded from evidence). Thus, any statement by Oliver not identifying Buckley is inherently favorable to Buckley, especially for impeachment purposes.[1]

[1]Buckley did not attach or proffer the statement. This did give us some pause, after all, our review is somewhat constrained without it. Here, however, the State does not dispute

During her testimony, Oliver went off script from what was expected and said that Buckley was, in fact, inside when Gearhart was shot and the burglary was taking place. Even a contradiction that is merely *useful* for impeachment purposes constitutes impeachment evidence subject to *Brady* disclosure requirements. *Strickler*, 527 U.S. at 282 (contrast between the witness testifying at trial to something being a "terrifying incident" and a police record indicating her perception of the event was "a trivial episode of college kids carrying on" is impeachment evidence which must be disclosed).

This leads us to the third element of a *Brady* analysis––was there prejudice. The majority concludes that there was not. First, they reason, Oliver admitted to not identifying Buckley in any written statements to police and to testifying inconsistently from an earlier case, "impeaching her own credibility." Second, they contend that the entirety of the evidence placing Buckley at the scene was substantial enough, even without Oliver's testimony, to demonstrate his participation, at least as an accomplice. I have a few problems with this.

First, the nondisclosure, in and of itself, is prejudicial. Defense counsel was surprised by Oliver's statement. Just because this attorney was able to pivot and ask some effective questions on cross-examination does not mean that the State's sin is absolved. Certainly, counsel did as well as can be expected, better even, given the circumstances, but impeaching

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the statement's existence or contents. It confirmed on the record its notes were that Oliver was not going to identify Buckley as being inside the house. Buckley was entitled to the evidence in the State's possession that allowed the State to reach those conclusions.

a witness can be rather nuanced. Buckley was prejudiced because he did not have the benefit of the statement to work with in developing the point to the jury. And to hold, as the majority would, that Buckley's cross-examination of Oliver somehow fixed the error would be to punish Buckley for having good lawyers and reward the State despite its wrongdoing. But the prejudice extends beyond just the exchange at trial and impeachment. It began well before that. Had counsel had the information before it, to which it was entitled, counsel would have had the benefits of Oliver's statement for purposes of trial strategy (recall, Buckley was also on trial for murder) and making a fully developed argument to the court.[2]

Nor is the accused required to demonstrate that he would have obtained a different verdict just to demonstrate prejudice, *Kyles*, *supra*, something the majority implies when it reasons that substantial evidence beyond Oliver's testimony establishes accomplice liability for burglary. No, the question is this: Did Buckley receive a trial resulting in a verdict worthy of confidence? I do not think so.

At a minimum, Buckley was unable to thoroughly impeach a key witness, and it casts a different light on the remaining evidence tying him to the crime. Furthermore, the jury found Buckley not guilty of the murder charges *even with* the benefit of the theory of accomplice liability, underscoring how very close this case was to those weighing the evidence. Given this record, I believe there is a very real chance that had the *Brady* material

[2]For example, in *Napue v. People of the State of Illinois*, 360 U.S. 264 (1959), the Supreme Court held it was a denial of due process when a prosecutor failed to correct testimony he knew to be mistaken, even though the lie went only to the witness's credibility.

been available to the defense, the outcome concerning the burglary charge may have been different. The nondisclosure "put[s] the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434.

It was an abuse of discretion to deny the posttrial motion.

ABRAMSON and VIRDEN, JJ., join.

Lassiter & Cassinelli, by: *Michael Kiel Kaiser*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Brooke Jackson Gasaway*, Ass't Att'y Gen., for appellee.