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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

In this case, the majority bootstraps a few arguable disclosure violations into cause for a mistrial based on manifest necessity.

The majority finds that manifest necessity for a mistrial is appropriate because the State failed to provide notice of a rebuttal witness; the State failed to disclose Jones's pretrial statement which the majority deems to be exculpatory; and the State failed to disclose that Jones had been offered the possibility of entering a plea to unaggravated robbery in exchange for his testimony. This Court has held that "[b]efore a manifest necessity exists which would warrant the declaring of a mistrial and the discharging of the jury and ordering a new trial, the circumstances must be prejudicial, or appear to be prejudicial, to the accused or the state." Syllabus Point 3, *State ex rel. Brooks v. Worrell*, 156 W.Va. 8, 190 S.E.2d 474 (1972). It is clear that the alleged errors cited by the majority were not prejudicial to the defendant.

First, the majority readily acknowledges that the failure of the State to disclose a rebuttal witness in an alibi case before the witness testifies does not require the reversal of

a criminal conviction. As noted by the majority, in *State v. Roy*, 194 W.Va. 276, 460 S.E.2d 277 (1995), we held that the nondisclosure did not necessitate reversing the conviction because the defendant did not request a recess or a continuance in order to prepare a challenge to the witness's testimony. Also, in *State v. Miller*, 195 W.Va. 656, 466 S.E.2d 507 (1995), this Court affirmed the conviction where an undisclosed rebuttal witness gave testimony contrary to the defendant's alibi defense because, *inter alia*, the defendant failed to request a recess or a continuance of the proceedings. In the instant case, the defendant did not move for a recess or a continuance when Jones was called to testify. Therefore, application of our precedent in *Roy* and *Miller* mandates that no reversible error occurred and likewise no manifest necessity for a mistrial.

Second, I do not believe the defendant was prejudiced by the State's failure to disclose Jones's pretrial statement. Significantly, it is questionable whether the statement is exculpatory. At trial, the defendant testified that he was sleeping at his mother's house in Charleston at the time of the robbery at approximately 5:00 a.m. Jones indicated in his pretrial statement that he dropped the defendant off at the house in Charleston at 3:00 a.m. Thus, even if the jury had believed Jones's pretrial statement, the statement is not inconsistent with the fact that the defendant robbed the Taco Bell two hours later at 5:00 a.m. In addition, I fail to see, and the majority does not explain, how the State's failure to disclose the statement hampered the defendant's preparation of his case. Finally, I do not believe,

in light of the strong circumstantial and physical evidence of the defendant's guilt, that disclosure of Jones's pretrial statement would likely have changed the outcome of the trial. Therefore, any error in the State's failure to disclose Jones's pretrial statement was harmless and certainly did not necessitate a mistrial based on manifest necessity.

Finally, I am at a complete loss as to how the State's failure to disclose that Jones had been offered the possibility of entering a plea to unaggravated robbery in exchange for his testimony prejudiced the defendant. Jones testified at trial that he was offered the possibility of a plea. Because the jury heard this evidence, how could the nondisclosure of the plea offer prior to trial amount to prejudicial error?

In sum, there simply was no basis in this case for the grant of a mistrial based on manifest necessity. When one considers the totality of the evidence at trial, it is clear that the defendant had a fair opportunity to prepare and present his defense. Any surprise to the defendant arising from the State's nondisclosure could easily have been dealt with simply by moving for a recess or continuance to prepare to challenge Jones's testimony. That the defendant was unsuccessful in his defense is not due to any nondisclosure on the part of the State but rather to the substantial evidence of guilt. The bottom line is that the defendant was properly tried, and the jury, which heard all of the relevant evidence, found the defendant guilty of aggravated robbery. There simply is no sound legal reason why this conviction

should not stand.

Accordingly, I dissent.