IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

02-CR-0021-C

v.

DURRIEL E. GILLAUM,

Defendant.

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Defendant Durriel E. Gillaum has filed a motion for a new trial based on the government's alleged failure to turn over exculpatory material, in violation of its obligations under Brady v. Maryland, 373 U.S. 83, 87 (1963). Defendant asserts that the government had an obligation to disclose reports from the Bureau of Alcohol, Tobacco and Firearms and the Fitchburg (Wisconsin) Police Department concerning the theft of the handgun that was at issue in this case. The government denies that it had any obligation to turn over the reports because they were not material to the jury's determination of defendant's guilt.

A jury found defendant guilty of possession of a gun by a convicted felon, but not until his second trial on the charge. (His first trial ended in a mistrial in June 2002.) The

government's theory of the case was not that defendant was the owner of the gun in question but that he had constructive possession of it while it was in his apartment. The government based its prosecution on the evidence it adduced from police officers, who testified that they had found a gun in defendant's bedroom when they raided his apartment on December 4, 2001, and that defendant had admitted to one of them that he had handled the weapon and had run bullets through it to make sure it worked. Defendant and his witnesses testified that a young man named Jory Stinson had brought the gun to defendant's apartment and had sold it to Rashaan Ross, who was staying with defendant at the time. Defendant admitted that Ross had shown him the gun but said that he had told Ross to get it out of the apartment. Tr. at 142-43. Defendant denied having told any officer that he had handled the gun or run bullets through it, but admitted that he had not told the officers that it belonged to Ross. Id. at 143-45.

Defendant contends that the government should have told him that it had learned that the gun had been stolen from the residence of a man named Brian Hesterly on December 1, 2001, and that Hesterly had told the police that he thought Jory Stinson was responsible for the burglary. Had the government done so, he argues, the information would have bolstered his testimony and that of his wife's two children, who testified on his behalf. Also, he argues, it would have made it more likely that the jury would have believed his story, which is that Jory Stinson had sold the gun to Rashaan Ross and that only Ross had

possessed the gun while it was in defendant's apartment.

To prevail on his motion for a new trial, defendant must show that he has newly discovered evidence that he became aware of only after the trial, that he could not have discovered the evidence by due diligence any sooner, that the evidence is material and that it would probably lead to an acquittal if a new trial were to be held. United States v. Brumley, 217 F.3d 905, 909 (7th Cir. 2000). To prove that the government violated its obligations under Brady, defendant must show that the government suppressed evidence that was both favorable and material to his defense.

The government does not deny that it did not produce the documents or disclose them to defendant until after the presentence report had been prepared, but it asserts that the failure to disclose the information was inadvertent. Moreover, it argues, it is irrelevant whether it failed to produce the reports because they were neither favorable to defendant nor material, in the sense that there is a "'reasonable probability' that [their] disclosure to the defendant would have changed the result of the trial." United States v. Irorere, 228 F.3d 816, 829 (7th Cir. 2000) (quoting United States v. Silva, 71 F.3d 667, 670 (7th Cir. 1995)).

Although it is difficult to understand why the government failed to give the burglary reports to defendant, I cannot say that there is a reasonable probability that doing so would have changed the outcome of the trial. The government never argued that the gun was not

Rashaan Ross's or that anyone other than Jory Stinson was responsible for bringing it into defendant's apartment. Instead, the government's case rested entirely on the location of the gun in defendant's bedroom and his admission to a police officer that he had handled the gun and run bullets through it to see whether it worked.

Defendant argues that the withheld evidence had special significance in this case. The only testimony that defendant presented was his own and his wife's children's. He notes that his wife's son, Shawn Sykes, had a prior felony conviction and that his wife's daughter could be expected to testify favorably to the man she thought of as her father. Rashaan Ross was nowhere to be found. Under these circumstances, defendant says, the jury would be bound to take a jaundiced view of his testimony. Perhaps they would not even believe that there was a person named Rashaan Ross. Defendant argues that the police reports would have helped lend credence to the testimony because they would have corroborated his and Shawn's testimony that Jory Stinson had sold the gun shortly before the raid took place. The difficulty for defendant, however, is that the reports would not have provided any support for the testimony that it was Ross who had bought the gun from Stinson. The reports indicate that the gun came from a burglary and that Stinson was a suspect in the burglary; they indicate nothing about what happened to the gun after Stinson stole it, assuming he did. If the jury was inclined to disbelieve defendant and his wife's children, the reports would not have convinced them that it was Rashaan Ross and not defendant or his

wife's son who bought the gun from Stinson.

Although defendant has shown that he has newly discovered evidence and that he became aware of it only after trial, he has not shown that the evidence is material or that it would have been favorable to him, let alone that it would probably lead to an acquittal if a new trial were to be held. Therefore, defendant's motion for a new trial will be denied.

ORDER

IT IS ORDERED that defendant Durriel E. Gillaum's motion for a new trial is DENIED.

Entered this 19th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge