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STATE OF MINNESOTA

HENNEPIN COUNTY

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Court File No. 27-CR-20-12951

State of Minnesota,

Plaintiff,

v.

Thomas Kiernan Lane,

Defendants.

DEFENDANT'S RESPONSE TO STATE'S MEMORANDUM REGARDING DEFENSE DISCOVERY MOTION

The discovery requested is relevant and material. Admissibility is not what we are arguing at this point in the process. We are simply requesting discovery, and the State is required to disclose it under the rules. We cannot seek approval for evidence not yet provided. The State's disclosure obligations are broader than what may ultimately be admissible in court.

The State argues that the evidence would not be admissible because it would relate to a collateral matter and cause mini trials. Although we are not arguing admissibility as part of our motion for discovery, for sake of responding, we are not seeking to introduce fact scenarios from other sustained use of force incidents where officers failed to intervene. The evidence of non-intervention would be sought through questioning of a witness(es) to elicit evidence of theory versus practice as it relates to the "duty to intervene". The State has spoken with several of its witnesses: police officers, investigators, and experts about this policy, they should too be able to answer defense questions as it relates to the policy in practice.

The prosecutor's office has a duty to disclose. Minn. R. Crim. P. 9.01. Despite the fact that technology has made it easier for defense counsel to access these types of records, the duty

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of disclosure remains on the state. See Unpublished, but persuasive, case *State v. Soriano-Clemente*, No. A08-1159, 2009 WL 2432052, at *4 (Minn. Ct. App. Aug, 11, 2009) (attached). The State suggesting that the defense somehow gain access to the records itself violates *Brady*. It is expected that the defense would not get very far by making a public request for such records. If we did ultimately receive anything, it would likely be untimely and may not contain complete and accurate records. The State has an obligation to disclose *Brady* material and information that is in the hands of the police. *Kyles*, 514 U.S. 437-38; see *State v. Williams*, 593 N.W.2d 227, 235 (Minn. 1999). The State has *Brady* obligations with respect to its law enforcement and other witnesses in all cases. It is the State that should be gathering, reviewing, and disclosing potential impeachment and other exculpatory material and information. There is no distinction, for the State's *Brady* obligations, between public or private data.

The State has sought after and received several reports to use in this case from MPD that they believe are in its favor (for example, prior bad acts for the other defendants). By it now arguing that it has basically no connection to MPD is absurd. The goal is for a criminal trial to be fair. The State is not proceeding with that notion in mind. Although materiality and potential prejudice typically cannot be determined until after trial, the U.S. Supreme Court has noted that, when in doubt, a prudent prosecutor will err on the side of disclosure of potential *Brady* material to "justify trust in the prosecutor" as one who pursues justice rather than convictions. *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995).

The records are "in control" of the prosecutors, the prosecutors have been working closely with the Minneapolis Police Department on this case for over a year. They have sought after and received several police reports, witness statements, and other evidence from them. By the State arguing that the "MPD's only connection to the case is that Defendant Lane and his co-

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Defendants worked for the MPD at the time of the murder" (State's Memo, P. 3) is misguiding the court. Further, the defendant should not be prejudiced because the Attorney General's Office is handling this prosecution and not the Hennepin County Attorney's Office. The MPD regularly reports to or works with Hennepin County Attorney's because that is who typically prosecute felony cases in Hennepin County. Because the AG's office does not typically prosecute criminal cases and they do not have as strong of a connection to the MPD should not fault the defendant. Also, the Hennepin County Attorney's Office has been part of the "prosecution team" in this case. The State has an obligation to obtain the requested reports and provide them to the defense, they are essential to the defense in this case and are exculpatory evidence.

Dated this 29th day of July, 2021.

Respectfully submitted,

s/Earl P. Gray
Earl P. Gray #37072

s/ Amanda J. Montgomery
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2009 WL 2432052
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Odimar SORIANO-CLEMENTE, Appellant.

No. A08-1159.
|
Aug. 11, 2009.

West KeySummary

1 **Criminal Law**Impeaching Evidence

Failure to disclose victim's past crimes involving dishonesty, where victim was the only eyewitness, prejudiced defendant in prosecution for aggravated robbery. Victim alleged that defendant was the person who robbed her at gunpoint while she was working at her sister's store. Victim was the only eyewitness to the defendant's identity, and credibility was a central issue in the case. Prosecution failed to disclose that victim had been convicted for drug possession, perjury, use of different names and birth dates when arrested, and multiple convictions for dishonesty crimes, including financial transaction fraud. 49 M.S.A., Rules Crim.Proc., Rule 9.01.

Hennepin County District Court, File No. 27CR07131099.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN; and Michael O. Freeman, Hennepin County Attorney, Alan J. Harris, Assistant County Attorney, Minneapolis, MN, for respondent.

Lawrence Hammerling, Chief Appellate Public Defender, Davi Axelson, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by BJORKMAN, Presiding Judge; STONEBURNER, Judge; and STAUBER, Judge.

UNPUBLISHED OPINION

STAUBER, Judge.

*1 On appeal from his conviction of first-degree aggravated robbery, appellant argues (1) the state's failure to disclose to the defense the main witness's prior convictions for dishonesty crimes violated appellant's rights under the federal and state constitutions and (2) appellant received ineffective assistance of counsel when his attorney failed to check the main witness's criminal record prior to trial. Because appellant was prejudiced by the nondisclosure, we reverse and remand.

FACTS

While working in her sister's clothing store in North Minneapolis, M.H. and her mother were robbed at gunpoint. Two assailants demanded M.H.'s purse and money from the cash register. M.H. told them that she had more money in the back room, and when a gunman followed her around a back corner, M.H. kicked him, causing both assailants to flee the store. M.H. followed them, yelling that she had been robbed, and saw them drive off in a waiting black Jeep. She provided the license plate number to the police. Appellant was apprehended later that day.

At trial, testimony was presented by M.H., her mother, two police officers, a fingerprint specialist, and appellant. Officer Swierczek testified that after receiving a call from dispatch about the robbery, he followed a black Jeep coming from the direction of the crime with a license plate number matching the number that M.H. had provided. He followed the Jeep until it stopped, and two people exited. One of the individuals who exited the Jeep, identified in court as appellant Odimar Soriano-Clemente, fled on foot. Officer Swierczek pursued and eventually apprehended appellant. Backtracking along the foot-pursuit route, Officer Swierczek discovered two guns in a snowbank on the same block where appellant was apprehended. No fingerprints were identified from the guns.

M.H.'s mother testified that the store had been robbed at gunpoint by two men, but she was unable to identify appellant as one of the men. M.H. was the only witness who identified appellant as one of the assailants. And M.H.'s initial statement to the police was that appellant was "Asian," despite the fact that appellant is Mexican.

Appellant told police when he was apprehended and testified later at trial that his presence in the Jeep that day was simply to buy drugs and that he was not involved in the robbery. He testified that on the day of the robbery he had entered a black Jeep occupied by four males in order to buy marijuana. One of the men indicated that he did not have the marijuana on him and would have to drive somewhere to purchase it. The Jeep stopped near the store, and two of the males jumped out of the SUV and returned a few minutes later. Appellant testified that when the Jeep later stopped in a parking lot, he became frightened and fled. The jury found appellant guilty of first-degree aggravated robbery in violation of Minn.Stat. § 609 .245, subd. 1 (2006).

After trial, but before sentencing, appellant's counsel discovered that M.H. had a significant prior record, consisting of convictions for: (1) drug possession (marijuana); (2) perjury; (3) use of different names and birthdates when arrested; and (4) multiple prior convictions for dishonesty crimes, including financial transaction fraud. Appellant made a motion for a new trial based on the state's failure to disclose and provide M.H.'s criminal history under Minn. R.Crim. P. 9.01. Appellant had filed a routine discovery request at the beginning of the case requesting disclosure of the names, addresses, and prior record of convictions of witnesses that the prosecution intended to call.

*2 The district court denied appellant's motion for a new trial at the sentencing hearing. In denying the motion, the district court noted:

> I also have to say that it would have been better had the jury known about [M.H.]'s criminal record, had she been able to be impeached with these prior convictions. I can't and don't necessarily conclude that it would have affected the outcome of the trial.
>
> The real credibility issue with her was whether she had a correct identification of the Defendant, and calling him Asian instead of Hispanic and so on. I believe that was much more to a cross-racial identification issue than it did to honesty. And I don't think there was much of an issue of whether she was robbed. In many of the things that [defense counsel] has argued as to what the jury would have known about, or had they known about all this really goes more to her character than it does to her credibility.
>
> If the jury had known she was a local drug dealer and why the robbery made more sense if she was a drug dealer than just selling used clothing.
>
> But for the proper purposes of impeaching her, I am not concluding that it would have made a difference in the outcome of the trial. And I would leave that for the Appellate Court who would properly make that decision.

This appeal follows.

DECISION

"Whether a discovery violation occurred presents a question of law, which we review de novo." *State v. Colbert*, 716 N.W.2d 647, 654 (Minn.2006). The rules of criminal procedure provide:

> The prosecuting attorney shall disclose to defense counsel the names and addresses of the persons intended to be called as witnesses at the trial together with their prior record of convictions, if any, within the prosecuting attorney's actual knowledge.
>
> ....
>
> The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

Minn. R.Crim. P. 9.01, subd. 1(1)(a), (6). Beyond rule 9.01, "*Brady* ... requires the State to disclose all exculpatory evidence, including impeachment evidence." *State v. Miller*, 754 N.W.2d 686, 706 (Minn.2008).

Appellant argues that under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the state was required by the Fourteenth Amendment of the United States Constitution to disclose all evidence favorable to him. Appellant contends that respondent violated this duty when it failed to disclose its main witness's prior criminal history.

To establish an actionable *Brady* violation, a defendant must demonstrate that (1) the evidence was favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was willfully or inadvertently suppressed by the state; and (3) the suppression of the evidence prejudiced the defendant. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn.2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).

***3** Appellant argues that the three conditions to establish an actionable *Brady* violation have been met. Respondent concedes that the prior conviction evidence was inadvertently suppressed, and it could have been used to impeach M.H., but argues that the third condition has not been met because no prejudice resulted, and appellant has failed to prove that the convictions were material.

To grant a new trial for a *Brady* violation, the court must find that the evidence is material. *Id.* at 460 (citing *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* "A 'reasonable probability' is one that is 'sufficient to undermine confidence in the outcome.' " *Id.*

Appellant argues that evidence of M.H.'s convictions was material because her credibility would certainly have been called into question if the jury knew about her past crimes involving dishonesty. And appellant's testimony that he was in the wrong place at the wrong time and was only trying to buy marijuana would be supported by M.H.'s prior marijuana possession conviction. Appellant contends that he was prejudiced because the jury likely would have realized his reasonable explanation for being at the shop and likely would have learned M.H. had a tendency to lie, so the outcome of the trial would have been different.

When examining prejudice, this court looks at whether the evidence would have been admissible at trial and whether, in any reasonable likelihood, the evidence could have affected the judgment of the jury. *State v. Hunt*, 615 N.W.2d 294, 299-300 (Minn.2000); *see also Gorman v. State*, 619 N.W.2d 802, 806 (Minn.App.2000) (outlining prejudice inquiry), *review denied* (Minn. Feb. 21, 2001). Without evaluating all of the prior convictions and past criminal history in detail, respondent's concession that, at the very least, the conviction for possession of marijuana would be admissible is enough for this court to next determine whether the evidence could have affected the judgment of the jury.[1]

As the only eyewitness to the perpetrator's identity, M.H.'s credibility was central to this case. Appellant's cross-examination of M.H. exposed her past experience with booking photos, and her inaccurate identification of appellant as "Asian" already brought her credibility into question, but did not impugn her reputation for honesty the way that impeachment by her prior convictions would have. The supreme court has cautioned that "[n]ondisclosure of evidence that is merely impeaching may not typically result in the kind of prejudice necessary to warrant a new trial." *Hunt*, 615 N.W.2d at 300-01. But it has also held that "[w]here the nondisclosed evidence could have significantly impeached the state's key witness, regardless of subsequent developments with that evidence, ... the defendant has suffered prejudice from the nondisclosure." *Id.* at 301; *see also Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) (holding government's failure to disclose impeaching evidence regarding only witness to crime is prejudicial).

***4** Given M.H.'s critical importance to the state, we cannot say that this evidence could not with any reasonable likelihood have affected the judgment of the jury.[2] *See State v. Poganski*, 257 N.W.2d 578, 579-80 (Minn.1977). Accordingly, appellant is entitled to a new trial.

It is not relevant whether the prosecution's failure to provide the required discovery was an inadvertent violation of *Brady*, because there is no requirement under *Brady* that the suppressed evidence be within the prosecuting attorney's actual knowledge. *State v. Miller*, 754 N.W.2d 686, 706 (Minn.2008). A prosecutor has a duty to make reasonable efforts to learn about this evidence, and despite the fact that technology has made it easier for defense counsel to access these types of prior

records, the duty of disclosure remains on the state under Minn. R.Crim. P. 9.01. Here, the discovery was not only readily accessible in electronic form, but respondent admits that another member of its own office had previously prosecuted M.H.

It is well-established that this court does not review a counsel's tactical decisions involving trial strategy, but we recognize that the strategy of a defense counsel is based on the evidence available to him at the time of trial, and had defense counsel here known of M.H.'s prior convictions it is likely that his rational theory of the case would have been enhanced.

Because we conclude that the prosecution violated the rules of discovery, we need not reach appellant's alternative argument that blame fell to his defense attorney for failing to check MNCIS for M.H.'s criminal record.

Reversed and remanded.

All Citations

Not Reported in N.W.2d, 2009 WL 2432052

Footnotes

1 It is highly likely that several of M.H.'s other convictions would also be available for impeachment purposes.

2 The inability of the district court to conclude whether it affected the outcome of the trial is further indication of the materiality of this impeachment evidence.

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