This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0462

Anthony Lee Nelson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 31, 2009
Affirmed; motion granted
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-03-046187

Anthony Lee Nelson, OID# 204140, 1000 Lake Shore Drive, Moose Lake, MN 55767 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Klaphake, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Pro se appellant Anthony Lee Nelson argues that the postconviction court (1) erred in concluding that *Knaffla* bars his claim that section 609.245 fails to provide fair notice

of prohibited conduct; (2) erred in concluding that *Knaffla* bars his claim that he is entitled to a new trial because the state failed to disclose *Brady* material; (3) abused its discretion by failing to hold an evidentiary hearing on his *Brady* claim; and (4) erred in concluding that *Knaffla* bars his claim that his sentence exaggerates the criminality of his conduct. By motion, appellant also requests that this court consider the argument that his consecutive sentence violates *Apprendi* and *Blakely*. We affirm.

D E C I S I O N

Following a court trial in 2003, appellant was convicted of five counts of aggravated robbery in the first degree and one count of felon in possession of a firearm. *State v. Nelson*, No. A04-749, 2005 WL 2126022, at *1-2, (Minn. App. Sept. 6, 2005), *review denied* (Minn. Nov. 22, 2005). The district court sentenced appellant to 171 months' imprisonment and executed a previously stayed 88-month sentence for an unrelated first-degree aggravated robbery offense committed in October 2001. The district court ordered that appellant serve his 171-month sentence consecutive to his 88-month sentence. Appellant directly appealed his convictions and sentence. On direct appeal, this court affirmed appellant's convictions but remanded for resentencing. *Id.* at *1. On remand the district court sentenced appellant to 96 months' imprisonment. As with appellant's first sentence, the district court imposed the 96-month sentence for the 2003 crimes consecutive to appellant's 88-month sentence for the 2001 robbery. Subsequently, in 2007, appellant petitioned for and was denied postconviction relief.

Knaffla bars reconsideration in a postconviction petition and appeal of issues raised on direct appeal or issues known by the defendant and not raised on direct appeal.

State v. Knaffla, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), *cited in Sessions v. State*, 666 N.W.2d 718, 721 (Minn. 2003). We review the denial of postconviction relief based on the *Knaffla* procedural bar for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005). The supreme court has identified three exceptions to the *Knaffla* rule: if additional fact-finding is required to fairly address a claim of ineffective assistance of counsel; if a novel legal issue is presented; or if the interests of justice require relief. *Sessions*, 666 N.W.2d at 721. "The interests of justice exception may be applied if fairness requires and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal." *Id.*

I.

Appellant argues for postconviction relief on the ground that the prohibition on aggravated robbery contained in Minn. Stat. § 609.245 (2002), does not provide fair notice of what conduct is prohibited. We conclude that *Knaffla* bars this claim.

The record reflects that appellant first raised this claim in his petition for postconviction relief. This claim is one that appellant knew or should have known at the time of his direct appeal. Consequently, *Knaffla* bars consideration of this claim. Appellant asks us to review this claim under the interests of justice exception to *Knaffla* but provides no argument or authority supporting his request. We conclude that fairness does not require our review of this claim and therefore, we decline to exercise our discretion to review this claim in the interests of justice. Thus we affirm the district court's conclusion that *Knaffla* bars appellant's fair notice claim.

II.

Appellant sought postconviction relief on the ground that prior to trial, the state failed to disclose police reports in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). Although not barred by *Knaffla*, we conclude that this claim fails on the merits.

The postconviction court concluded that this claim is one that appellant knew or should have known about at the time of his direct appeal. Appellate courts "review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We "afford great deference to a district court's findings of fact and will not reverse the findings unless they are clearly erroneous." *Id.* Here, the record does not support the district court's conclusion that appellant knew of this claim at the time of direct appeal. Rather, the record indicates that appellant first learned of the allegedly exculpatory evidence after the conclusion of his direct appeal. Thus, we examine whether this is a claim that appellant should have known about at the time of his direct appeal. *See Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) (stating that *Knaffla* bars claims that were known or should have been known at time of direct appeal).

Under *Brady*, in criminal cases, the state "has an affirmative duty to disclose evidence that is favorable and material to the defense." *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999); *see Pederson v. State*, 692 N.W.2d 452, 459-60 (Minn. 2005) (stating that the first two components of the *Brady* test are embodied in Minn. R. Crim. P. 9.01, which requires the state to disclose to defense counsel any relevant written or

recorded statements and any material tending to negate or reduce guilt). "Regardless of whether the prosecution succeeds in this duty, the state's duty to disclose material, favorable evidence is inescapable." *Williams*, 593 N.W.2d at 235 (quotation omitted).

Because of the prosecutor's failure to disclose the police reports, we conclude that appellant's *Brady* claim is not one that appellant should have known about at the time of his direct appeal. To hold otherwise would impermissibly preclude *Brady* claims where a defendant's discovery of nondisclosed evidence occurs after direct appeal is taken. Therefore, we will review the district court's alternative conclusion that appellant's *Brady* claim fails on its merits.

Three components are necessary to establish a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice to the accused must have resulted. *Pederson*, 692 N.W.2d at 459 (citations omitted). In order for a new trial to be granted for failure to disclose exculpatory evidence, the evidence must be material under the third prong of *Brady*. *Id.* at 460 (citation omitted). Because materiality issues under *Brady* involve both questions of law and fact, the proper standard of review is de novo. *Id.* "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 been different." *Id.* (quotation and citation omitted). "A 'reasonable probability' is one that is 'sufficient to undermine confidence in the outcome.'" *Id.* (citation omitted).

The police reports at issue indicated that the robbery victim's car keys were not recovered from appellant. The district court concluded that the reports were not material. Appellant contends he has satisfied the prejudice prong of *Brady* because of the admissibility of the reports and because of their potential use in impeaching the testimony of two police officers. But the police reports' impeachment value only concerns a set of car keys taken from one of five robbery victims and appellant was convicted of taking that victim's cell phone, necklace, earring, watch, bracelet, and car keys. In addition, the district court found the testimony of that victim credible and persuasive, and the victim positively identified appellant in the courtroom as the individual who robbed him, identified an exhibit as one of the guns pointed at him by appellant during the robbery, and identified appellant shortly after appellant's arrest.

On this record, the fact that the state failed to disclose police reports indicating that police officers recovered the keys to the victim's vehicle from someone other than appellant do not sufficiently undermine our confidence in the outcome of the trial. We conclude that the reports are not material under *Brady* because there is no reasonable probability that the trial result would have been different. We thus affirm the district court's conclusion that appellant's *Brady* claim fails on its merits.

III.

Appellant argues that the district court abused its discretion by failing to hold an evidentiary hearing on his *Brady* claim. A petitioner seeking postconviction relief has the burden of establishing by a fair preponderance of the evidence that the facts warrant relief. Minn. Stat. § 590.04, subd. 3 (2002). The court must hold a hearing "[u]nless the

petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Id.*

Here, appellant failed to meet his burden of establishing that disclosure of the police reports would have altered the outcome of the trial. Because the record conclusively shows that petitioner is not entitled to relief on his *Brady* claim, the district court did not err by denying appellant an evidentiary hearing.

IV.

Appellant argues that the postconviction court abused its discretion by denying, on *Knaffla* grounds, his claim that the consecutive nature of his post-remand sentence fails to comport with the purposes and goals of the Minnesota sentencing guidelines and exaggerates the criminality of his conduct. Appellant did not directly appeal his post-remand sentence. Because this petition for postconviction relief constitutes appellant's first challenge to his 96-month post-remand sentence, we conclude that *Knaffla* does not bar appellant's challenge to his sentence.

On direct appeal, this court reversed appellant's 171-month sentence and remanded for resentencing. On remand, the district court sentenced appellant to 96 months' imprisonment. Appellant's 96-month sentence includes one 60-month sentence for a conviction of felon in possession of a firearm, four concurrent 48-month sentences for four convictions of aggravated robbery in the first degree, and one 48-month sentence for a fifth conviction of aggravated robbery in the first degree running consecutive to the other robbery sentences. The resulting 96-month sentence was ordered served

consecutive to a previously stayed 88-month sentence for a first-degree aggravated robbery committed in 2001.

We generally will not review a district court's exercise of its sentencing discretion in cases where the sentence imposed is within the presumptive range. *State v. Williams*, 337 N.W.2d 387, 391 (Minn. 1983). And "absent compelling circumstances, this court will not interfere with actions of the sentencing court which are permitted by the guidelines." *State v. Beamon*, 438 N.W.2d 397, 400 (Minn. App. 1989) (affirming 90-month executed sentence for conviction of six counts of simple robbery), *review denied* (Minn. May 12, 1989). It is not contested that aggravated robbery is a crime against a person. District courts are permitted to sentence current felony convictions for a crime against a person consecutively to an unexpired prior felony sentence for a crime against a person. *See* Minn. Sent. Guidelines II.F., cmt. II.F.04. And district courts are permitted to consecutively sentence multiple current felony convictions for crimes against persons, such as aggravated robbery. *Id.*

Thus, the district court here permissively sentenced appellant to consecutive sentences. The record shows that the district court carefully considered the reasons for sentencing one of his 2003 aggravated robbery convictions consecutive to the other four aggravated robbery convictions stating: "[t]he Court believes that the terror and trauma inflicted upon [the victim] and the children, who were present during the commission of that offense, compels a consecutive sentence on Count 5." We conclude that the district court acted within its discretion and within the guidelines, that the consecutive sentences

comport with the purposes of the guidelines, and that there are no compelling circumstances justifying interference with appellant's sentence.

Appellant next argues that his sentence is not proportional to other offenders who committed similar offenses and that his sentence exaggerates the criminality of his conduct. When a criminal defendant raises an issue of fairness in sentencing, appellate courts have the discretion to modify the sentence. *State v. Norris*, 428 N.W.2d 61, 70 (Minn. 1998). Whether consecutive sentencing exaggerates the criminality of a defendant's conduct is determined by observing sentences in similar cases. *State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992) (citation omitted).

The Minnesota Supreme Court imposed a 214-month sentence for convictions of five counts of aggravated robbery committed as part of the same behavioral incident by a defendant while he was on a five-day furlough from prison. *State v. Goulette*, 442 N.W.2d 793, 794-95 (Minn. 1989). In *State v. Henderson*, this court affirmed the imposition of a 25-month sentence for aggravated robbery running consecutive to a 53-month sentence for aggravated robbery. 382 N.W.2d 275, 279 (Minn. App. 1986), *review denied* (Minn. Apr. 18, 1986). And in *State v. Harris*, this court affirmed a 60-month sentence for attempted murder, consecutive to a 36-month sentence for aggravated robbery and a concurrent sentence of 36 months for four counts of second-degree assault. 396 N.W.2d 622, 623-24 (Minn. App. 1986). These decisions demonstrate that the imposition of a 96-month sentence for five convictions of aggravated robbery and one conviction of ineligible person with a firearm is not excessive and does not unfairly exaggerate the criminality of appellant's conduct. Nor does the fact that the district court

ordered appellant's 96-month sentence to run consecutive to his 88-month sentence for his unrelated first-degree aggravated robbery conviction indicate that appellant's sentence is disproportionate. The district court acted within the sentencing guidelines and gave cogent reasons for its decision to impose consecutive sentences. We therefore decline to modify appellant's sentence.

Moreover, on direct appeal, this court noted that "[i]t seems possible that had the district court known the presumptive sentence was actually 48 months . . . it would have made *one or more* of those sentences consecutive to the other current sentences [and] [i]t could have done so without departure." *Nelson*, 2005 WL 2126022, at *5 (emphasis added). This court further stated that "[o]n remand, the district court may consider making the sentences for the other robberies consecutive to the sentence for the robbery against M.S.S." *Id.* But on remand, the district court chose to sentence appellant more leniently than suggested by this court and only imposed one consecutive 48-month sentence for aggravated robbery. We thus conclude that appellant's sentence does not exaggerate the criminality of his conduct.

Finally, we grant appellant's motion to consider his additional arguments that concurrent sentencing is presumptive and that sentencing one of his robbery convictions consecutive to the other four convictions violated *Blakely*. Concurrent sentencing is generally presumptive for offenders convicted of multiple current offenses. *See* Minn. Sent. Guidelines II.F. But as previously discussed, there are situations where consecutive sentences are permissive. This is such a situation and we conclude that the district court did not abuse its sentencing discretion.

Appellant also argues that his sentence is improper under *Blakely* because a jury did not make findings to support the imposition of consecutive sentences. We reject this argument because *Blakely* does not apply to permissive consecutive sentencing under the guidelines. *See State v. Senske*, 692 N.W.2d 743, 749 (Minn. App. 2005) (holding that there is no basis to apply *Blakely* to consecutive sentences), *review denied* (Minn. May 17, 2005); *see also Oregon v. Ice*, 129 S. Ct. 711, 714-15 (2009) (concluding that the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, findings of fact necessary to impose consecutive, rather than concurrent, sentences for multiple offenses). Thus, we conclude appellant's additional challenges to his sentence fail.

Affirmed; motion granted.