STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1706

State of Minnesota,
Respondent,

vs.

Eric James Hawkins,
Appellant.

Filed September 21, 2010
Affirmed
Stauber, Judge

Sherburne County District Court
File No. 71CR073388

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Kathleen Heaney, Sherburne County Attorney, Leah Emmans, Assistant County Attorney, Elk River, Minnesota (for respondent)

Earl P. Gray, Mark D. Nyvold, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Stauber, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant challenges his criminal-sexual-conduct convictions, arguing that a new trial is warranted because the state failed to disclose certain police records involving the complainant. Because appellant was not prejudiced by the state's failure to disclose the information and because the interests of justice do not require a new trial, we affirm.

FACTS

In November 2007, appellant Eric James Hawkins, then 44 years old, was charged with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct.

Appellant moved the district court for an order requiring the state to disclose, among other things, all police reports containing allegations of sexual abuse involving the adolescent complainant, A.H. The district court ordered the state to disclose to the court any Sherburne County law-enforcement records involving A.H. that had not already been released.

Before trial, the state provided the defense with information that D.H., a juvenile, had sexually assaulted A.H.[1] While hospitalized in July 2006, A.H. disclosed that she had been raped by an older male friend approximately two years earlier, when she was 13 years old. Notes of the prosecutor's December 2008 interview of A.H. provide more detail:

[1] Contrary to appellant's assertion to this court during oral argument, the material disclosed to appellant before trial does include D.H.'s first and last name.

> [A.H.] stated she and [D.H.] were very close friends. She stated in the summer, when she was 12 years old, that [D.H.]'s dad had died very suddenly. One time when [D.H.] was at [her] house, . . . he became extremely angry with her for some reason and she did not know why. [D.H.] pushed [her] down in the bedroom. She stated that [D.H.] was 17 at the time. [He] then took off her pants and forced himself on her sexually. . . . She stated after the penetration, her mother came home . . . .
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> [A.H.] then went on to state that the police were called and because she was so afraid and did not know what to do, she did not know if this was considered rape or not. [A.H.] stated she was scared to death to say anything because her father was so mad; that he even punched a hole in the wall. [A.H.] stated [D.H.] had told her not to tell anyone. [A.H.] stated that the cops came over and the incident did not go any further.
>
> . . . She then stated in regard to the [D.H.] incident that she told her parents it was a consensual act.

Appellant's jury trial was held in January 2009. A.H. testified that appellant, a friend of her parents, had been her soccer coach and trainer. Appellant sometimes drove A.H. to and from soccer events. Whenever they were alone in his vehicle, appellant made sexual remarks to A.H.

A.H. described the incident underlying the charge of second-degree criminal sexual conduct. When A.H. was 14 years old, appellant drove her home from soccer practice. While they were alone in appellant's vehicle, appellant exposed himself to A.H. and placed her hand on his bare penis. He also touched her bare breasts after ordering her to remove her shirt and bra. A.H. did not immediately report this incident because she was scared.

A.H. described the incident underlying the charge of first-degree criminal sexual conduct. During the winter when she was 14 years old, appellant offered to drive A.H. home from indoor soccer training. Appellant drove to a nearby alley, where he ordered A.H. to remove her shirt and bra. He touched her bare breast and digitally penetrated her vagina. A.H. did not immediately report this incident because she was embarrassed and blamed herself for accepting appellant's offer to drive her home.

A.H. also described two occasions when she was alone in her house with appellant. On one occasion, appellant entered through an unlocked door and asked to use the telephone. A.H. telephoned her father, who told her to let appellant use the telephone. Appellant repeatedly asked A.H. if he could watch her take a shower. A.H.'s father testified that A.H. had indeed telephoned him to tell him that appellant was in the house; A.H.'s father described the situation as "awkward" and did not know why appellant had come to the house.

The second occasion occurred on Halloween when A.H. was 14 years old. Appellant drove A.H. home after a soccer game, and A.H., who planned to attend a community event with her family later that evening, went into the empty house to change her clothes. Appellant followed A.H. into the house and asked if he could watch her take a shower. A.H. said no and shut herself in her room. Her parents then entered the house. A.H.'s mother described finding appellant in the house as "weird" and "not normal"; a family friend who was present when appellant left the house described appellant's face as "the expression of your hand [being] caught in the cookie jar" and "borderline cocky."

A.H. did not immediately report appellant's conduct, but she exhibited signs of extreme distress, including being suicidal and physically harming herself. In July 2006, A.H. learned that appellant had asked if A.H.'s younger sister (who is approximately the same age as one of appellant's daughters) could spend the night at his home. A.H. "had a meltdown" and agreed to be admitted to a psychiatric hospital. At the hospital, A.H. told her mother and a psychologist about appellant's conduct. A.H. also disclosed that D.H. had forced her to have sexual intercourse.

At trial, appellant's counsel cross-examined A.H. about D.H.:

> Q. [D.H.] did a really horrible thing to you?
> . . . .
> A. Yes.
> Q. And your mom arrived right afterwards?
> A. Yes.
> Q. And you told her something that wasn't true to cover for him? . . .
> . . . .
> Q. You told your mom that it was something that you wanted to do; and you really didn't want to do it?
> A. Yes, he raped me so many times. And my dad—she called my father and my father came home pissed and punched a hole in the wall. I was scared to death. I didn't tell.
> Q. And people got—your parents got mad at you for something you absolutely didn't do?
> A. Yes.
> Q. And that had to hurt a lot?
> A. Yes, it did.
> Q. Because you were blamed for something that wasn't your fault?
> A. I didn't—
> Q. Right?
> A. —I didn't tell them at that time that it wasn't my fault because they were so mad. I just thought if I said it wasn't, that it would just be over with. I was twelve.

A.H. testified that she began to engage in self-destructive behavior and perform poorly in school because of what D.H. had done to her and because of her parents' reaction.[2]

A.H.'s parents described A.H.'s psychological decline as beginning at the age of 13. She was eventually hospitalized for ten days in July 2006. A.H.'s mother explained that A.H. did not immediately speak with police after being released from the hospital because of her still-fragile mental state. A.H.'s mother also testified that A.H. initially lied about the D.H. incident.

Three of A.H.'s former teammates testified that appellant occasionally drove a group of players, including A.H., to and from soccer events. Two of the teammates recalled A.H. being the first player picked up or the last player dropped off. At her sixteenth birthday party, A.H. told these two witnesses about appellant's conduct. One of the teammates heard appellant make inappropriate comments about A.H.'s body. And the mother of a former teammate testified that appellant treated A.H. differently than a coach usually treats a player.

Appellant testified that he coached and trained A.H., and he admitted to transporting her with a group of children on one occasion. He denied being alone in a vehicle with A.H., denied exposing himself to her, and denied touching her sexually. He also denied being alone in A.H.'s house with her.

The jury found appellant guilty of both charges, and appellant moved for a new trial. At a June 2009 hearing, appellant alleged that the state had failed to disclose police

[2] Before trial, the district court ruled that the defense would be allowed to "fully explore alternate sources" of the symptoms exhibited by A.H. if the state argued that these symptoms were caused by appellant.

reports involving D.H.'s sexual assault of A.H. The district court ordered the state to disclose all public information in the juvenile court file for D.H.'s assault of A.H. and to submit any privileged or confidential information to the court.

The state then disclosed the juvenile court file,[3] which contains the following relevant information. On March 15, 2004, A.H.'s father reported that 13-year-old A.H. was having sexual intercourse with 17-year-old D.H. A.H.'s parents explained to Elk River Police Officer Jeffrey Garcia that A.H.'s mother had found A.H. and D.H. alone in A.H.'s bedroom that afternoon. Officer Garcia spoke to A.H. alone, and she admitted to having sex with D.H. only one time, in February 2004. A.H. stated that she wanted to have sex with D.H. on that occasion. A.H. also told the officer that D.H. had digitally penetrated her in March 2004. The officer noted in his report that A.H. "appeared to be upset concerning the decision she had made in having intercourse with [D.H.]." The officer also observed scratches on A.H.'s wrist; A.H. stated that the scratches were self-inflicted.

Elk River Police Detective Eric Balabon interviewed A.H. in April 2004. A.H. told the detective that she and D.H. had sex on two occasions, including March 15, 2004. A.H. also mentioned one instance of digital penetration that occurred in December 2003. A.H. admitted lying to Officer Garcia.

[3] The state also provided appellant with a video recording of Elk River Police Detective Eric Balabon's January 2007 interview with A.H. regarding appellant. A transcript of this interview was disclosed to appellant before trial. The transcript does not include approximately three-and-one-half minutes of conversation between A.H. and the detective that are audible on the video.

The detective spoke with several of A.H.'s friends, who told him that A.H. lies about her age. When he spoke to A.H. again, she changed part of her story regarding whether D.H. knew her age.

Detective Balabon also interviewed D.H. D.H. told the detective that he and A.H. had engaged in sexual intercourse approximately 20 times, that "he never forced [her] to do anything," and that A.H. had told him she was 14. D.H. was charged with third-degree criminal sexual conduct, adjudication of delinquency was stayed for one year, and he was placed on probation.

After the state disclosed the juvenile file, appellant renewed his motion for a new trial on the ground that he had been prejudiced by the state's failure to disclose the information before trial. Appellant submitted the affidavit of his trial counsel, who stated that he would have cross-examined A.H. differently and would have changed his closing argument if he had received access to the untimely disclosed information. The district court determined that a nondisclosure had occurred and that the information in question "was at least in part in the nature of impeachment." The district court then addressed the issue of prejudice, finding that A.H. had not made a false allegation against D.H. because consent was not a defense[4] and that A.H. had made inconsistent statements about the details of D.H.'s sexual contact with her. The district court also found:

> The defense did in fact know that there was a difference between what was originally reported and what

[4] D.H. was 17 years old; A.H. was 13 years old. *See* Minn. Stat. § 609.344, subd. 1(b) (2002) (stating that consent by the complainant is not a defense when the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant).

> was subsequently reported. The defense did have the opportunity to cross-examine the victim about those inconsistencies. The defense did in fact cross-examine the victim with respect to those incidents.
>
> And given that the material that was not disclosed simply reiterates in some greater detail the relationship between the victim and the third individual involved in the earlier incident. Some of that information contained within the material that was disclosed post verdict presentence would not have likely been admissible at trial. And since the defense did have the opportunity to cross-examine on the fundamental inconsistencies of the victim between that first incident and the incidents that bring [appellant] before the Court and through the jury trial process, the Court concludes that there was no prejudice sufficient to warrant a new trial in the matter.

The district court denied appellant's motion for a new trial and sentenced him to serve 144 months in prison. This appeal follows.

D E C I S I O N

We review the denial of a motion for a new trial for an abuse of discretion. *State v. Green*, 747 N.W.2d 912, 917 (Minn. 2008).

I. Appellant was not prejudiced by the state's failure to disclose.

Appellant argues that a new trial is warranted because the state violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and Minn. R. Crim. P. 9.01 by failing to disclose all information involving D.H.'s sexual assault(s) of A.H. We disagree.

The prosecution is required to disclose all exculpatory evidence to the defense. *State v. Colbert*, 716 N.W.2d 647, 655 (Minn. 2006). "Under *Brady*, the suppression by the State, whether intentional or not, of material evidence favorable to the defendant violates the constitutional guarantee of due process." *Walen v. State*, 777 N.W.2d 213,

216 (Minn. 2010). A *Brady* violation has three elements: (1) the evidence is favorable to the defendant because it is exculpatory or impeaching; (2) the evidence was suppressed by the prosecution, "intentionally or otherwise"; and (3) the evidence was material—that is, its absence "must have caused prejudice to the defendant." *Id.*

The state incorrectly asserts that the first *Brady* element is not met. The *Brady* disclosure obligation includes impeaching information. *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000) (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985)). Here, the state failed to disclose information relevant to A.H.'s credibility, including police reports indicating that she made conflicting statements to her parents and law enforcement in 2004 about her sexual activity with D.H. and that she has a reputation for untruthfulness. This information falls within the *Brady* disclosure obligation. *See Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005) (stating that where a witness's reliability "may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the *Brady* rule" (quotation omitted)).

As to the second *Brady* element, the state concedes that the information was suppressed. We therefore turn to the third *Brady* element: materiality. A district court's *Brady* materiality determination is reviewed de novo. *Walen*, 777 N.W.2d at 216. In making a materiality determination, an appellate court "consider[s] the effect the undisclosed evidence would have had in the context of the whole trial record." *Id.* To obtain a new trial, appellant has the burden of showing that the state's discovery violation was prejudicial. *See Colbert*, 716 N.W.2d at 655. That is, appellant must show that a "reasonable probability exists that the outcome of the trial would have been different if

the evidence had been available." *See id.* (quotation omitted). A reasonable probability is one that is "sufficient to undermine confidence in the outcome." *Walen*, 777 N.W.2d at 216 (quotation omitted). "Accordingly, a new trial is not required simply because a defendant uncovers previously undisclosed evidence that would have been possibly useful to the defendant but unlikely to have changed the verdict." *Id.*; *see also State v. Scanlon*, 719 N.W.2d 674, 685 (Minn. 2006) (stating that discovery-related misconduct by the state is harmless if the verdict rendered was "surely unattributable to the error" (quotation omitted)). "Nondisclosure 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 where the nondisclosed evidence "could have significantly impeached the state's key witness," a defendant has suffered prejudice. *Id.* at 301.

Appellant argues that the information suppressed by the state shows the following: A.H. told several lies to law enforcement in 2004 about the details of her sexual activity with D.H., including whether she "consented" and the number of times they had sexual intercourse; A.H.'s demeanor during a recorded interview with Detective Balabon in 2004 is inconsistent with her trial testimony that she was raped by D.H.; A.H. lied about the resolution of the criminal case against D.H.; A.H. has a poor reputation for truthfulness; and A.H. was wrong about the date of death of D.H.'s father. Appellant contends that if the state had disclosed this information, his trial counsel would have been able to aggressively challenge the truthfulness of A.H.'s testimony that D.H. had raped her "so many times," instead of endorsing A.H.'s version of events related to D.H. and arguing to the jury that A.H.'s mental distress was attributable to D.H.'s conduct.

At the time of trial, appellant knew that A.H. had reported in 2006 that D.H. had forced her to have sexual intercourse on one occasion when she was 13. Appellant also knew that A.H. had previously told her parents that D.H. had not forced her to have sex. Appellant was therefore aware that A.H. had made contradictory statements about her sexual activity with D.H. But when A.H. testified at trial that D.H. had "raped [her] so many times," appellant did not point out that this statement was inconsistent with both what she had told her parents in 2004 and what she had told her mother and the psychologist in 2006. Instead of attacking A.H.'s credibility by cross-examining her more extensively about these inconsistent statements, appellant's trial counsel elected to use evidence of these assaults to blame D.H. for A.H.'s severe psychological problems and eventual hospitalization.

Appellant argues that the juvenile file is relevant to A.H.'s character for truthfulness. But at the time of trial, appellant already knew that A.H. had lied to her parents about her sexual activity with D.H. And appellant knew that an adult witness had told law enforcement that A.H. had lied about an incident of theft and was unconcerned with lying.

Appellant also argues that the juvenile file shows that A.H. was wrong about the resolution of the criminal case against D.H. But the jury heard that A.H. lied about details of a sexual encounter—something far more relevant here than her being mistaken about the resolution of the case against D.H. The true resolution of the case could not have significantly impeached her.

Appellant, citing an obituary notice, argues that A.H. was incorrect about the date of D.H.'s father's death. But the name of D.H.'s father is contained only in a sealed document that was never disclosed to appellant. Appellant apparently was able to find the obituary notice using only D.H.'s name, which was known to him before trial.

Here, the jury heard several witnesses—including A.H.—testify that A.H. had initially lied to her parents about details of her sexual activity with D.H.[5] Appellant's trial counsel made a strategic decision not to cross-examine A.H. more extensively about the inconsistencies in her statements about D.H. The state's failure to disclose the juvenile file, though clearly improper, was not prejudicial to appellant because A.H. was successfully impeached at trial and, on this record, we cannot conclude that appellant's trial counsel would have used a different cross-examination strategy if the information had been available. *See State v. Miller*, 754 N.W.2d 686, 706 (Minn. 2008) (holding that defendant was not prejudiced by state's suppression of information regarding witness's prior felony convictions where the witness's credibility was successfully impeached at trial). Appellant has not shown that a reasonable probability exists that the outcome of the trial would have been different if the juvenile file had been available. *See Colbert*, 716 N.W.2d at 655.

[5] As the district court observed, nothing in the record indicates that A.H. made a false allegation against D.H. A.H. could not have consented to sexual intercourse due to the difference in their ages. *See* Minn. Stat. § 609.344, subd. 1(b) (stating that consent by complainant is not a defense).

II. The interests of justice do not warrant a new trial.

Appellant argues that he is entitled to a new trial in the interests of justice. We disagree.

The grant of a new trial in the interests of justice is reserved for extraordinary cases. *Green*, 747 N.W.2d at 919. Appellant is correct that a verdict may be overturned based on discovery violations even if prejudice is not explicitly shown. *Scanlon*, 719 N.W.2d at 687; *State v. Freeman*, 531 N.W.2d 190, 199 (Minn. 1995) (acknowledging that appellate courts have, "on limited occasion," awarded new trials in the interests of justice even when prejudice to the defendant is not clear). "But in these cases, the evidence was concealed in bad faith or was very important to the defense." *Scanlon*, 719 N.W.2d at 687; *see also State v. Kaiser*, 486 N.W.2d 384, 386–87 (Minn. 1992) (granting new trial in the interests of justice where prosecutor deliberately concealed exculpatory information, telling a witness to "keep her mouth shut").

Appellant argues that the state concealed the juvenile file in bad faith. Like the district court, we are very concerned by the state's failure to disclose the material in question. The state's proffered explanations for the nondisclosure are weak. First, the state claims that it was unable to locate the juvenile file because of a misspelling of D.H.'s first name. But the state was able to find and disclose police reports from matters unrelated to appellant or D.H. that mentioned A.H. only as a witness. Second, the state claims that A.H.'s "well-documented recollection that the [D.H.] matter had been dropped led to the State not discovering the file in the state's system." But the state does not explain why it relied on an adolescent sexual-assault victim's memory of the

resolution of a criminal matter. We also note that Detective Balabon, who testified for the state at appellant's trial, took statements from A.H. regarding D.H. in 2004 and regarding appellant in 2007. In fact, A.H. reminded the detective of the D.H. case during the 2007 interview. We therefore agree with the district court that the state should have been readily able to locate and disclose the juvenile file. But the state's apparent lack of diligence in locating the file, though troubling, does not, on this record, rise to the level of bad faith. And the record does not indicate deliberate concealment. *See Scanlon*, 719 N.W.2d at 687 (distinguishing oversight or mistake from deliberate attempts to hide facts or surprise the defense).

Finally, appellant argues that the juvenile file was important to his defense because the state's case against him was not strong. *See id.* (stating that a new trial may be granted in the absence of prejudice if the undisclosed evidence was "very important to the defense"). Specifically, appellant argues that any information that could be used to impeach A.H. was of critical importance because the case rested on A.H.'s credibility.[6] Appellant is correct that there was no physical evidence in this case and that there were no third-party eyewitnesses to the conduct underlying the criminal charges. But A.H.'s testimony was corroborated in many respects. She provided the jury with detailed descriptions of appellant's sexual conduct toward her. *See Marshall v. State*, 395 N.W.2d 362, 365 (Minn. App. 1986) (noting that strong corroborating evidence includes "detailed descriptions by the victim of the incidents"), *review denied* (Minn. Dec. 17, 1986). She was distraught when she reported appellant's conduct to her mother and the psychologist.

[6] Appellant does not challenge the sufficiency of the evidence supporting his convictions.

See State v. Reinke, 343 N.W.2d 660, 662 (Minn. 1984) (noting that "significant corroborating evidence" includes "testimony by others as to the victim's emotional condition at the time she complained"). And several witnesses corroborated A.H.'s testimony that appellant was occasionally alone with her in his vehicle and in her home and one witness corroborated that he made sexual remarks about A.H.'s body. The additional information that appellant could have used to further impeach A.H. would not have affected the corroborating testimony of the other witnesses.

Affirmed.