STATE OF MINNESOTA
IN COURT OF APPEALS
A10-617

State of Minnesota,
Respondent,

vs.

Rosalva Yessenia Markowitz,
Appellant.

Filed April 19, 2011
Affirmed
Schellhas, Judge

Rice County District Court
File No. 66-CR-09-1965

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

G. Paul Beaumaster, Rice County Attorney, Benjamin Bejar, Assistant County Attorney, Faribault, Minnesota (for respondent)

Jorma Cavaleri, Law Office of Jorma Cavaleri, Faribault, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges her conviction of driving while impaired. Appellant argues that she was denied due process because the state failed to preserve potentially exculpatory evidence and she was denied the right to present a complete defense because

numerous continuances of her trial date resulted in the loss of her primary witness. We affirm.

FACTS

Late in the evening of May 29, 2009, a police officer stopped appellant Rosalva Markowitz on northbound I-35 for speeding in her cousin's black Grand Am. O.C. and H.M. were passengers in the vehicle. The officer issued seat-belt tickets to Markowitz and O.C.

Several hours later, while Markowitz, O.C., H.M., and a fourth person returned home from a St. Paul nightclub, the black Grand Am crashed on southbound I-35. Rice County Deputy Sheriff Daniel Belcourt arrived at the crash scene and saw two females, including Markowitz, and two ambulance personnel inside an ambulance. O.C. and the fourth person had left the scene. Deputy Belcourt overheard Markowitz tell the ambulance driver that she was driving when the crash occurred.

Lieutenant Jeffrey Westrum of the Minnesota State Patrol arrived at the scene shortly after Deputy Belcourt. Initially, Markowitz told Lieutenant Westrum that O.C. had been driving when the crash occurred, but she later admitted to him that she had been driving. Markowitz failed a field sobriety test administered by Lieutenant Westrum and was "very nervous and uneasy," her movements were "pronounced and exact," and she emitted a strong odor of alcohol. Lieutenant Westrum concluded that Markowitz was impaired and arrested her for driving while impaired.

Lieutenant Westrum transported Markowitz to the Rice County jail in Faribault, read her the implied-consent advisory, and administered a breath test that registered a .14

alcohol concentration. After Lieutenant Westrum gave Markowitz a Miranda warning, she provided a statement in which she again admitted that she had been driving at the time of the crash. She also admitted that her alcohol consumption affected her ability to drive.

On June 9, 2009, respondent State of Minnesota charged Markowitz with (1) fourth-degree driving while under the influence in violation Minn. Stat. §§ 169A.20, subd. 1(1), .27, subd. 1 (2008), and (2) fourth-degree driving with an alcohol concentration of .08 or more in violation of Minn. Stat. §§ 169A.20, subd. 1(5), .27, subd. 1 (2008). Markowitz pleaded not guilty, and the district court scheduled the case for a jury trial on August 26, 2009. For various reasons, the trial was rescheduled five times before February 17, 2010. On the scheduled trial date of February 17, another case was being tried and the district court therefore continued Markowitz's trial to March 15. Markowitz demanded a speedy trial because her witness, H.M., whom Markowitz claims would have testified that Markowitz was not driving, planned to move to Texas. The district court assured Markowitz that a trial would occur within 60 days. Due to a scheduling conflict with the March 15 trial date, by e-mail on February 18, defense counsel requested a different trial date. The court denied the request.

On March 2, the state moved for a continuance of the March 15 trial date because its primary witness would be unavailable on March 15. On March 3, Markowitz objected to the state's request for a continuance, arguing that H.M. had been subpoenaed for the March 15 date, that she might not be available for a new court date, and that subpoenaing

her might be difficult because she had moved to Texas. The district court granted the continuance and rescheduled the trial to March 22.

On March 15, Markowitz filed a motion to dismiss for denial of due process. The district court heard Markowitz's motion on March 22. Markowitz argued that, on the night of the accident, two people in a van reported the accident to police and that on August 25, 2009, defense counsel had requested a copy of the 911 recording of the report. The state had informed defense counsel on December 1, 2009, that the 911 recording no longer existed. Markowitz argued that she was denied due process because "significant delays in obtaining discovery . . . have resulted in potentially exculpatory evidence being destroyed and necessary and essential Defense witnesses becoming unavailable." She asserted that the 911 recording of the report to police the night of the accident presented Markowitz's only possible means of locating the people in the van, who may have exculpatory information. Markowitz also asserted that, due to the multiple trial continuances, H.M. was not available to testify in her defense, and that H.M. would have corroborated Markowitz's testimony that she was not driving at the time of the crash.

The state informed the district court that it had made requests to the Minnesota State Patrol for the information and had informed defense counsel when it learned that there was no recording. The state also argued that it had not deliberately attempted to delay the trial and that even if H.M. were available, it would impeach her with a prior inconsistent statement that she made to the police that Markowitz was driving.

The district court denied Markowitz's motion to dismiss, stating:

> [T]here is no evidence that the state has intentionally delayed this case or that the delay has intentionally prevented production of any evidence. It appears the evidence just didn't exist. There was not a demand for speedy trial until . . . February 17th, 2010[.] . . . There's nothing unusual about the continuances that have occurred in this case. That's the reality of misdemeanor cases, which are not given priority over felony and other cases that have been going to trial, and the court does not find that either her right to a speedy trial was denied or that her due process rights have been violated.

On March 22, the prosecutor informed the district court that she felt ill and requested that the trial not commence that day. The trial therefore commenced on March 24. Markowitz testified that she was not driving at the time of the crash, that she did not remember the crash, and that she did not know who was driving. She remembered waking up in the passenger seat and getting out of the right side of the car. She thought it likely that O.C. was the driver because she gave him the keys when they got to the nightclub. Markowitz testified that she told the officers that she had not been driving at the time of the crash, but when they kept asking her the same question, she told them she was driving because she thought they would not let her go home until they arrested someone or gave someone a ticket. She testified that she lied to the officers because she wanted to get home to her kids, who were at home with a babysitter.

The jury returned a guilty verdict on both counts. This appeal follows.

D E C I S I O N

Loss of 911 Recording

"A defendant's right to due process of law is implicated when the State loses, destroys, or otherwise fails to preserve material evidence." *State v. Jenkins*, 782 N.W.2d

211, 235 (Minn. 2010); *see also Arizona v. Youngblood*, 488 U.S. 51, 56–58, 109 S. Ct. 333, 336–38 (1988); *California v. Trombetta*, 467 U.S. 479, 485–91, 104 S. Ct. 2528, 2532–35 (1984). "When constitutional issues involving due process are raised, this court reviews the trial court's legal conclusions de novo." *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

"[W]hen analyzing a destruction-of-evidence claim, we consider whether the destruction was intentional and whether the exculpatory value of the lost or destroyed evidence was apparent and material." *Jenkins*, 782 N.W.2d at 235 (quotation omitted). But even if the state fails to preserve potentially useful evidence, the defendant is not denied due process unless he or she "shows bad faith on the part of the police." *Id.*; *see also Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337. When the evidence is intentionally destroyed, "we consider whether there is any evidence that the State destroyed . . . the evidence to avoid discovery of evidence beneficial to the defense." *Id.* (quotation omitted).

Markowitz argues that "the potential exculpatory value of the unknown 911 callers is apparent as they could likely testify as to who was driving the vehicle . . . as well as the potential statements of the male passengers that fled." Even if we assume that the exculpatory value of the 911 recording is apparent and material, we conclude that Markowitz was not denied due process. Markowitz makes no claim that the state acted in bad faith, and the record contains no evidence that the state destroyed the 911 recording to avoid discovery of evidence beneficial to the defense. Instead, she argues that

although some cases require bad faith, the bad-faith requirement arises only in certain specific instances, none of which is applicable to this case.

Minnesota law is clear that when alleging that the state failed to preserve potentially exculpatory evidence, a defendant is not denied due process unless he or she shows bad faith on the part of the police. *Jenkins*, 782 N.W.2d at 235; *State v. Bailey*, 677 N.W.2d 380, 393 (Minn. 2004); *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992); *Heath*, 685 N.W.2d at 56. Markowitz cites *State v. Nelson*, 399 N.W.2d 629 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987). But *Nelson* was decided prior to the U.S. Supreme Court's decision in *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337, requiring bad faith, which is followed by Minnesota courts. *See Bailey*, 677 N.W.2d at 393 (citing *Youngblood*); *Heath*, 685 N.W.2d at 56 (same). Markowitz's argument therefore lacks merit, and the district court did not err by denying her motion to dismiss.

Markowitz argues for the first time in her reply brief that "this case should be viewed as a matter of the State's failure to disclose." "Under our rules of procedure, '[t]he reply brief must be confined to new matter raised in the brief of the respondent.'" *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (quoting what is now Minn. R. Civ. App. P. 128.02, subd. 4). Because the state did not raise this matter in its brief,[1] we deem

[1] The state noted in its brief that "[t]his court has distinguished between the State's *failure to disclose* and the State's *failure to preserve* evidence." But that reference to failure to disclose is the state's only reference to failure to disclose. The state focused its argument on Markowitz's claim that it violated her due-process rights by failing to preserve the 911 recording. Because the state made no argument regarding whether it failed to disclose the 911 recording, we conclude that the state did not raise a failure-to-disclose issue.

Markowitz's argument to be waived. But even if Markowitz's argument were properly raised, it would fail.

In a criminal case, the state has an affirmative duty to disclose evidence that is favorable and material to the defense, and a violation of that duty violates due process. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963); *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999). Three components are necessary for a *Brady* violation: "First, the evidence at issue must be favorable to the accused, either because it is exculpatory or it is impeaching. Second, the evidence must have been suppressed by the state, either willfully or inadvertently. Third, prejudice to the accused must have resulted." *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (citations omitted). The record contains no evidence regarding the contents of the 911 recording. Markowitz cannot show that the evidence is favorable to her because the exculpatory value is speculative.

Loss of Primary Witness

Markowitz argues that the district court's denial of her request to reschedule the March 15 trial date to an "*earlier* date"[2] should be sufficient to show that the court did not afford her "a meaningful opportunity to present a complete defense." Markowitz seems to be arguing that by granting the state's motion for a trial continuance from March 15 to March 22, the court denied her the opportunity to present a complete defense

[2] The record does not show that Markowitz requested an earlier date; it shows only that she requested that the jury trial be *reset* from the March 15 date.

because her primary witness moved to Texas and became unavailable to testify. Markowitz's argument is unpersuasive.

"Every criminal defendant has the right to be treated with fundamental fairness and afforded a meaningful opportunity to present a complete defense." *State v. Profit*, 591 N.W.2d 451, 463 (Minn. 1999) (quotations omitted). "The decision to grant or deny a motion for a continuance lies within the sound discretion of the district court and will only be reversed upon a showing of abuse of discretion." *Johnson v. State*, 697 N.W.2d 194, 198 (Minn. 2005). "We examine the circumstances before the district court to determine whether the district court's decision prejudiced the defendant by materially affecting the outcome of the trial." *State v. Super*, 781 N.W.2d 390, 396 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. June 29, 2010).

We conclude that the district court's trial continuance did not prejudice Markowitz. First, even if H.M. would have corroborated Markowitz's testimony that she was not driving at the time of the crash, the state claims that it would have impeached H.M. with her prior inconsistent statement to the police that Markowitz was driving. Second, H.M. was already unavailable on March 15, 2010, because she was reportedly scheduled to move to Texas on February 15. Markowitz subpoenaed H.M. to appear for trial on February 17, but she did not appear on that date. On March 1, H.M. informed defense counsel that she had moved to Texas and would not be coming back. The district court's decision to reschedule the March 15 trial date to March 22 did not materially affect the outcome of the trial.

Affirmed.