First District Court of Appeal
State of Florida

No. 1D19-4659

DEANGELO HORN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
Robert E. Long, Jr., Judge.

October 21, 2020

B.L. THOMAS, J.

Appellant challenges the trial court's summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm the trial court's ruling.

The jury convicted Appellant of sexual battery on a child under twelve years of age by a defendant eighteen years of age or older (count I) and attempted lewd or lascivious molestation (count II). The trial court sentenced Appellant to life in prison on count I and fifteen years in prison on count II. On appeal, this Court affirmed Appellant's sexual battery conviction and sentence, but reversed the attempted lewd or lascivious molestation conviction and sentence due to a jury instruction issue. *See Horn v. State*, 120

So. 3d 1 (Fla. 1st DCA 2012). Following this, the State dismissed count II.

Appellant argues that the State violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose records from the Department of Children and Families and a Tallahassee Police Department report that contained information that could have been used to impeach the credibility of the State's two key witnesses, D.M. (the victim) and M.M. Appellant claims that the State suppressed four pieces of evidence: two investigators' opinion reports on the instant case, historical reports showing the victim's family had a history of making dubious reports, a report noting that the victim had previously witnessed a sexual assault similar to what she alleged here, and a Tallahassee Police Department report that Appellant claims impeached the credibility of one of his accusers.

Appellant argues that the reports of the Department's investigators show that the investigators did not find the victim's allegations "particularly credible." These records allegedly show that the victim's claims did not seem to be substantiated because she had difficulty remembering details and information not provided to her by other parties. Appellant also argues that the prior reporting history and the police report could have been used to impeach the victim's credibility as well as M.M.'s credibility by demonstrating a history of filing false reports and allegations. He contends that these reports were material because his defense at trial was that the criminal allegations were fabricated by M.M.

The trial court found that the opinions of the caseworkers would not have been admissible at trial. The court ruled that the caseworkers did not participate in the interview and merely gave their opinion of the victim's statements and claims after watching a video recording of the interview. This same video was played for the jury at trial, and it was the jury's decision to determine the victim's credibility. The trial court further found that a Child Protection Team report included a summary of prior reports from the victim's family and noted that two prior investigations had been closed for lack of substantiation and that this report had been provided to defense counsel. The disclosed documents also mentioned that the victim had been involved in another case in

which the victim had observed the sexual assault of another minor. Thus, the trial court found that the State had not suppressed the prior Department reports or the report noting the incident the victim allegedly witnessed. Finally, the trial court ruled that the police report could not have been used to impeach the witness(es) because it concerned an unrelated matter and was inadmissible.

Appellant's claim that the State violated its obligations under *Brady* when it failed to disclose favorable information to the defense is meritless. 373 U.S. 83 (requiring the State to disclose material information within its possession or control that is favorable to the defense). To establish a *Brady* violation, a defendant must show that: "(1) the evidence was either exculpatory or impeaching; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) because the evidence was material, the defendant was prejudiced." *Davis v. State*, 136 So. 3d 1169, 1184–85 (Fla. 2014) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). The materiality prong requires that the defendant to demonstrate "a reasonable probability that had the suppressed evidence been disclosed, the jury would have reached a different verdict." *Id.*

As to the Department investigators' reports, the trial court correctly ruled that these reports would not have been admissible. As a general rule, "it is not proper to allow an expert to vouch for the truthfulness or credibility of a witness." *Frances v. State*, 970 So. 2d 806, 814 (Fla. 2007) (citing *Feller v. State*, 637 So. 2d 911, 915 (Fla. 1994); *State v. Townsend*, 635 So. 2d 949, 958 (Fla. 1994)). The general rule applies to prohibit an expert witness from testifying concerning the truthfulness or credibility of the victim in child sexual abuse cases. *Weatherford v. State*, 561 So. 2d 629, 634 (Fla. 1st DCA 1990). These reports would not have been admissible to impeach the testimony of the victim or M.M. where the opinion testimony regarding previous behavior was to be used to undermine the credibility of the victim's new and distinct accusations. *See Tingle v. State*, 536 So. 2d 202, 205 (Fla. 1988) (holding that it was error for the state's witnesses to directly testify as to the victim's credibility). This case is distinguishable from other cases in which an expert expressed an opinion on whether a child was sexually abused. *See Glendening v. State*, 536 So. 2d 212, 221 (Fla. 1988) (holding that "it was proper for an expert to express

an opinion as to whether a child has been the victim of sexual abuse, but "improper for the expert witness to testify that it was her opinion that the child's father was the person who committed the sexual offense.").

In the instant case, Appellant intended to use these reports not to show whether the victim had been sexually abused, but, instead, to discredit the victim's testimony based on past behavior unrelated to the instant case. *See Roebuck v. State*, 953 So. 2d 40, 42 (Fla. 1st DCA 2007) ("[C]redibility may not be attacked by proof that a witness committed *specific acts of misconduct* which did not end in a criminal conviction."). Neither report would have been admissible under those circumstances, and, thus, Appellant's argument fails the *Brady* test.

Appellant's argument that the State committed *Brady* violations by failing to disclose the historical reports is also meritless. "[A] *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Geralds v. State*, 111 So. 3d 778, 787 (Fla. 2010) (quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). For example, where a defendant had prior knowledge of who was with him in the hours before a murder, his *Brady* claim regarding the State's failure to disclose interview notes containing certain witnesses' statements about being in his company and noticing that he was intoxicated, was defeated. *Occhicone*, 768 So. 2d at 1041. Similarly, where a defendant was present when he made statements during his polygraph, he could not raise a *Brady* claim based upon withheld evidence of a polygraph report. *Farr v. State*, 124 So. 3d 766, 780 (Fla. 2012).

In the instant matter, the State disclosed to the defense a report that was specifically denoted to be "a brief summary" of the forensic interview with the victim and the circumstances surrounding the situation. The summary stated that further information was available via court order, subpoena, or a property slip from law enforcement. The summary noted that the Department had been previously involved with the victim's family with similar cases that had been closed with "no indicators" of sexual abuse, as well as a statement that a Child Protection Team

had been involved with the family in 2009 after claims that the victim and another member of the family were abused. This information was known to Appellant and trial counsel. The record shows that trial counsel stated that he had received the report and incorporated elements of it into his trial strategy. Appellant was, therefore, on notice as to the existence of these prior reports and could have investigated further. *See Pagan v. State*, 29 So. 3d 938, 947–48 (Fla. 2009) ("If the evidence in question was known to the defense, it cannot constitute *Brady* material."). Thus, the claim fails prong two of the *Brady* test.

Finally, Appellant's claim that the State committed a *Brady* violation by failing to disclose the police report is meritless because it would not have been admissible at trial. "A witness' credibility may only be impeached by convictions of crimes involving dishonesty or false statements." *Washington v. State*, 985 So. 2d 51 (Fla. 4th DCA 2008) (quoting *Jackson v. State*, 545 So. 2d 260, 264 (Fla. 1989)). "[C]redibility may not be attacked by proof that a witness committed *specific acts of misconduct* which did not end in a criminal conviction." *Roebuck,* 953 So. 2d at 42. Appellant admits in his motion that none of the accusers faced criminal consequences for this allegedly false report. Furthermore, this Court's examination of the report indicates that the report itself does not accuse M.M. of a false allegation, but merely that the officer was unable to find signs of injury or "any obvious signs of a battery" upon the alleged victim in the prior unrelated matter. Thus, this report would not have been admissible to impeach M.M. in this case, and as a result, no *Brady* violation occurred.

AFFIRMED.

OSTERHAUS and BILBREY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Seth E. Miller and Krista A. Dolan of the Innocence Project of Florida, Inc., Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Robert "Charlie" Lee, Assistant Attorney General, Tallahassee, for Appellee.