

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 3, 2011

V
DENNIS S. SCHWARTZENBERGER,
Defendant-Appellant.

No. 297982
Washtenaw Circuit Court
LC No. 09-001149-FH

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of four counts of indecent exposure, MCL 750.335a, and was sentenced to probation. Defendant appeals as of right, and we affirm.

Defendant's convictions arise out of his contact with two eight-year old girls who resided in his neighborhood. There was a pond located on defendant's property, and he would allow children to use his boat and fish. One of the two victims became upset when her brother suggested that they go to defendant's home to play. This victim allegedly reported that defendant forced contact with his genitals, made her watch graphic films, and exposed his genitals. Ultimately, defendant was acquitted of the charged and amended offenses addressing second-degree criminal sexual conduct, MCL 750.520c, aggravated indecent exposure, MCL 750.335a(2)(b), and multiple counts of accosting children for immoral purposes, MCL 750.145a.

At trial, defense counsel questioned the mother of one of the victim's regarding her ex-husband and whether he had any criminal convictions. The prosecutor objected, noting that the issue should have been raised before trial, and the court agreed. Defense counsel asserted that he learned from defendant that the ex-husband had been convicted of child pornography charges. Because defense counsel was unaware of the ex-husband's name, he was unable to verify the information. When defense counsel learned that the prosecutor was aware of the ex-husband's criminal conviction, he raised a *Brady*¹ violation and requested dismissal of the charges. The trial court denied the motion, but adjourned the trial for six days to allow for discovery and ultimately admitted evidence of the ex-husband's criminal conviction at trial.

¹ *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Defendant alleges that he was deprived of his right to due process and a fair trial because the prosecution failed to timely provide defendant with exculpatory and material evidence. We disagree. Constitutional questions are reviewed de novo. *People v Jackson*, 483 Mich 271, 277; 769 NW2d 630 (2009). “Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure.” *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007) (citations omitted). “In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

Defendant failed to meet his burden of establishing a *Brady* violation. Assuming without deciding that the evidence was favorable to the defense, it must be demonstrated that the defendant did not possess the evidence nor could it have obtained the evidence with any reasonable diligence. *Cox*, 268 Mich App at 448. In the present case, defense counsel sought to introduce evidence of the ex-husband’s criminal conviction. When the prosecutor objected, defense counsel stated that defendant learned that the ex-husband had been convicted of child pornography. However, defense counsel asserted that he was unable to conduct his own research into the issue because he did not know the ex-husband’s name. Mechanisms are in place to allow for discovery in criminal cases, MCR 6.201, and for the prosecutor to provide assistance to the defense in locating and serving process upon witnesses, MCL 767.40a. There is no indication that the defense requested disclosure or assistance from the prosecutor to learn the ex-husband’s name or his criminal history.² Additionally, there is no indication that defense counsel availed himself of state resources to conduct criminal database searches.³ Because defendant failed to meet his burden of establishing the *Brady* factors,⁴ this issue does not entitle him to appellate relief.⁵

² In fact, defense counsel filed a motion for additional discovery, but did not request his information in the motion.

³ The Michigan Department of Corrections provides a searchable database known as Offender Tracking and Information System (OTIS), and the Michigan State Police provides the Internet Criminal History Access Tool (ICHAT). Additionally, the ex-husband had the same last name as the victim’s mother, who was named on the witness list.

⁴ We note that defendant cites to a report prepared by the Department of Human Services regarding an investigation into the ex-husband. However, the report contains hearsay, and ultimately evidence of sexual abuse could not be found by the lower standard of preponderance of the evidence.

⁵ The parties stipulated to dismiss the other two issues raised in defendant’s brief on appeal. In light of the stipulation, we do not address those issues.

Affirmed.

/s/ Jane E. Beckering

/s/ Karen M. Fort Hood

/s/ Cynthia Diane Stephens