STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0402

State of Minnesota,
Respondent,

vs.

Brandon Oneil Sturdivant,
Appellant.

Filed December 16, 2013
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CR-11-10023

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Hudson, Judge; and Chutich, Judge.

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

LARKIN, Judge

Appellant challenges the district court's denial of his petition for postconviction relief, arguing that the state's failure to disclose a potential witness's whereabouts violated Minn. R. Crim. P. 9 and *Brady v. Maryland* and that the potential witness's exculpatory statement is newly discovered evidence, "requiring a new trial or at least an evidentiary hearing." Appellant also challenges the district court's denial of his *Batson* objection to the state's peremptory challenge to a prospective African-American juror. Because the state's failure to provide defense counsel with the potential witness's address violated rule 9, we reverse and remand for an evidentiary hearing for the district court to determine whether the violation was prejudicial. We affirm in all other respects.

FACTS

On April 7, 2011, respondent State of Minnesota charged appellant Brandon Oneil Sturdivant with aiding and abetting first-degree aggravated robbery after two men robbed B.L.M. at gunpoint at M.R.N.'s apartment. On the night of the robbery, K.R. told police that she was in a bedroom in the apartment when the crime occurred. She heard someone yell, "Get on the ground!" She cracked open the bedroom door, peeked into the living room, and saw everyone lying on the ground, so she shut the door and kept quiet. K.R. also told the police that she was homeless.

On June 7, the defense sought an order "requiring [the] prosecution to disclose the names, addresses, and prior record of convictions within [the] prosecutor's actual

knowledge of persons whom the prosecution intends to call as a witness at the trial." The state located K.R. in the Hennepin County Adult Correctional Facility (the workhouse) in Plymouth before trial and served her with a subpoena on June 15. The prosecution provided defense counsel with witness lists on June 21 and July 6. Both lists identified K.R. as a potential witness with an address of "Plymouth, MN." The lists provided only a city and state for each potential witness, and not a street address.

The district court began a jury trial in July, but it declared a mistrial on the second day of voir dire because the state's main witness was unavailable. The district court held a second jury trial in October. The state's witness list for the October trial also listed K.R. as a potential witness, with an address of "Minneapolis, MN." The state did not subpoena K.R. for the second trial and did not attempt to locate her. At trial, B.L.M. and R.G., another individual who was present at M.R.N.'s apartment on the night of the crime, identified Sturdivant as one of the men involved in the robbery. The jury found Sturdivant guilty as charged.

After the trial, Sturdivant learned that K.R. was in the workhouse. A defense investigator interviewed K.R., and she said that she let two men into M.R.N.'s apartment on the day of the robbery. K.R. provided an affidavit stating:

> In late November, 2011, I met with . . . an investigator working for the Hennepin County Public Defender's office. [He] showed me a series of six photographs. I did not know any of the men in the photographs. The man in photograph number 5 was not one of the men I let in the door of [the apartment] on the day of the robbery. The man in photograph number 5 was not at [the apartment] on the day of the robbery.

Sturdivant asserted that he was the man in photograph number five.

Sturdivant moved the district court for a new trial, alleging several errors at trial, including the district court's denial of his *Batson* challenge during voir dire. Approximately two weeks later, Sturdivant e-mailed notice of a second motion for a new trial based on his discovery of K.R.'s whereabouts. The district court denied both motions.

Sturdivant appealed his conviction. This court granted Sturdivant's motion to stay the appeal and remand for postconviction proceedings. Sturdivant petitioned the district court for postconviction relief, citing K.R.'s posttrial statement and affidavit and arguing that the state violated its discovery obligations under the Minnesota Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The district court denied Sturdivant's petition without a hearing, and this court reinstated his appeal.

D E C I S I O N

Sturdivant argues that the district court erroneously denied his petition for postconviction relief because the state's failure to disclose K.R.'s whereabouts violated Minn. R. Crim. P. 9 and *Brady*, and because K.R.'s exculpatory statement is newly discovered evidence, "requiring a new trial or at least an evidentiary hearing." Sturdivant also argues that the district court erred by overruling his *Batson* challenge. We address each argument in turn.

I.

Sturdivant argues that the state violated Minn. R. Crim. P. 9.01, subdivision 1, by failing to disclose K.R.'s presence at the workhouse. Specifically, Sturdivant contends

that the state failed to comply with its obligation to disclose the "'addresses' of witnesses the prosecutor intends to call at trial and anyone with information about the case." "Whether a discovery violation occurred is a question of law that we review de novo." *State v. Boldman*, 813 N.W.2d 102, 109 (Minn. 2012).

The Relevant Facts

During K.R.'s only police interview regarding the crime, she told the police she was homeless. Accordingly, the relevant police reports describe K.R.'s residence as "Npa" and her telephone as "H:none." At some point before the first trial, the prosecutor's office determined that K.R. was incarcerated at the workhouse. On June 15, 2011, a Hennepin County Sheriff's Deputy, who is assigned to the prosecutor's office, served a subpoena on K.R. at the workhouse, directing her to appear as a witness for the state at trial. On June 16, K.R. telephoned a victim-witness advocate with the prosecutor's office from the workhouse. The victim-witness advocate put K.R. on "standby" status for trial, and K.R. agreed to inform the victim-witness advocate if she left the workhouse to go to treatment before the scheduled trial date of July 6, 2011.

The prosecutor provided a witness list to Sturdivant on or about June 21. It listed "[K.R.] Plymouth, MN" as a potential witness. On July 6, the prosecution provided Sturdivant a second witness list that once again listed "[K.R.] Plymouth, MN" as a potential witness. But the prosecutor did not inform Sturdivant that K.R. was incarcerated at the workhouse in Plymouth. After the district court declared a mistrial during the first trial, the prosecutor's office released K.R. from her subpoena and did not have further contact with her.

Although the prosecutor's office did not subpoena K.R. as a witness for the second trial, the prosecutor provided Sturdivant a third witness list that listed "[K.R.] Minneapolis, MN" as a potential witness. The state explains that the prosecutor changed K.R.'s location from Plymouth to Minneapolis in the third witness list "[i]n light of her likely release from the workhouse" and because Minneapolis was "where she had described herself to police as homeless." Unbeknownst to either party, K.R. apparently was once again incarcerated at the workhouse during the second trial.

The Alleged Discovery Violation

Under the rules of criminal procedure,

> [t]he prosecutor must, at the defense's request and before the Rule 11 Omnibus Hearing, allow access at any reasonable time to all matters within the prosecutor's possession or control that relate to the case, except as provided in Rule 9.01, subd. 3, and make the following disclosures:
>
> (1) Trial Witnesses; Other Persons; Grand Jury Witnesses.
>
> (a) Trial Witnesses. The names and addresses of witnesses who may be called at trial, along with their record of convictions, if any, within the prosecutor's actual knowledge. . . .
>
> (b) Other Persons. The names and addresses of anyone else with information relating to the case.

Minn. R. Crim. P. 9.01, subd. 1(1)(a), (b).

The rule further provides that

> [t]he prosecutor's obligations under this rule extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and

> who either regularly report, or with reference to the particular case have reported, to the prosecutor's office.

Id., subd. 1a(1).

Moreover, the rules of criminal procedure require ongoing and timely disclosures. The rules prescribe that

> (a) All material and information to which a party is entitled must be disclosed in time to afford counsel the opportunity to make beneficial use of it.
>
> (b) If, after compliance with any discovery rules or orders, a party discovers additional material, information, or witnesses subject to disclosure, that party must promptly notify the other party of what it has discovered and disclose it.
>
> (c) Each party has a continuing duty of disclosure before and during trial.

Minn. R. Crim. P. 9.03, subd. 2.

The Minnesota Supreme Court has explained the policy objectives underlying the broad disclosure obligations in rule 9 as follows.

> Pretrial discovery rules fulfill an essential role in the criminal justice system. . . . [T]he ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. . . . [This system is] designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. . . . Discovery avoids surprise, discourages false defenses, and aids in the detection of perjury by witnesses. More importantly, discovery saves time and expense in criminal proceedings. Reciprocal discovery, if used to its fullest extent, will encourage negotiated pleas or dismissals and avoid lengthy trials much in the same way discovery in civil actions avoids the expense of unnecessary

> litigation. But of course, for discovery to achieve its intended purposes the rule must be complied with. . . .

State v. Lindsey, 284 N.W.2d 368, 372-73 (Minn. 1979) (quotations and citations omitted).

Before we assess whether the prosecutor violated rule 9.01, subdivision 1, by failing to notify Sturdivant that K.R. was incarcerated at the workhouse, we consider whether the state was relieved of its disclosure obligations because, according to the state, "the case was subject to a prosecutor's certificate." The prosecutor's discovery obligations under rule 9.01 may be modified as follows:

> The information concerning the witnesses and other persons described in Rule 9.01, subd. 1(1) and (2) is not subject to disclosure if the prosecutor files a written certificate with the trial court that to do so may endanger the integrity of a continuing investigation or subject witnesses or other persons to physical harm or coercion. Non-disclosure under this rule must not extend beyond the time the witnesses or persons are sworn to testify at the trial.

Minn. R. Crim. P. 9.01, subd. 3(2).

Although the district court record and the state's brief refer to a prosecutor's certificate in this case, our review of the record does not indicate that the prosecutor filed a certificate. But even if the prosecutor did file a certificate, the district court ordered that "[t]he information described in the Prosecutor's Certification of Non-Disclosure in [this] case be disclosed to the defendant's counsel but it shall not be disclosed to the defendant." Thus, the state was not relieved of its rule 9.01, subdivision 1, disclosure obligations based on the filing of a prosecutor's certificate.

As to the alleged discovery violation, the state contends that "[b]y listing Plymouth, MN" as K.R.'s address on its first two witness lists, it disclosed more information than rule 9.01 requires. As support, the state argues that it did not fail to provide K.R.'s address because the workhouse was not K.R.'s "address, but was merely a temporary location at which the State located her for purposes of subpoena service" and that the workhouse "was not intended to be K.R.'s residence for any length of time." The state correctly notes that rule 9 does not define the term "address" and argues that neither the rules nor caselaw require it to provide a more specific description of the location of a possible witness. The district court adopted this reasoning in concluding that the prosecutor did not violate rule 9.01, explaining that "the State fulfilled only the minimal requirements of [its] discovery obligation with regard to [K.R.], [but] the State, nonetheless, fulfilled these obligations." For the reasons that follow, we disagree.

The interpretation of the rules of criminal procedure is a question of law that is reviewed de novo. *Dereje v. State*, ___ N.W.2d ___, ___, No. A11-1147, slip op. at 6 (Minn. Oct. 9, 2013). "[Appellate courts] interpret court rules in accordance with the rules of grammar and give words and phrases their common and approved usage." *State v. Hohenwald*, 815 N.W.2d 823, 829 (Minn. 2012). "When considering the plain and ordinary meaning of words or phrases, [the supreme court has] considered dictionary definitions." *State v. Heiges*, 806 N.W.2d 1, 15 (Minn. 2011).

Black's Law Dictionary defines "address" as "[t]he place where mail or other communication is sent." *Black's Law Dictionary* 44 (9th ed. 2009); *see also The American Heritage Dictionary* 20 (5th ed. 2011) (defining address as "[t]he location at which a

particular organization or person may be found or reached"). We easily conclude that at the time of the first trial, the street address for the workhouse was K.R.'s "address." It was the place where the prosecution sent K.R. a communication—the subpoena—directing her to appear as a witness at trial.

Our use of the plain and ordinary meaning of the word "address" is consistent with the policy objectives underlying the broad disclosure obligations of rule 9. Those policy objectives are not served by narrowly construing "address" to mean permanent residence, as the state suggests. Such a construction would tend to decrease the state's disclosure obligations by excluding any individual who is able to receive mail or other communications at a known, specific location even though that location is not his or her permanent residence. Instead, it is appropriate to use the plain and ordinary meaning that defines "address" as the location at which a person may be sent mail or other communication, in other words, the place where the person may be contacted. Use of that ordinary meaning furthers broad discovery by enabling the parties to contact potential witnesses or other persons who have information relating to the case for investigative purposes. *See Lindsey*, 284 N.W.2d at 372 (observing that the pretrial discovery rules are "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence" (quotations omitted)).

We observe that there is little to suggest that the prosecutor's nondisclosure in this case was in bad faith. We also observe that we have no reason to doubt the state's assertion that if Sturdivant "had asked the state for more precise information about

[K.R.'s] whereabouts, such assistance would no doubt have been forthcoming, as it was regarding the witnesses believed to be important to proof or defense of the case." But the assertion misses the point: under the plain language of rule 9.01, subdivision 1, once Sturdivant made a request for disclosure, the onus was on the prosecutor to comply with disclosure requirements of the rule. *See* Minn. R. Crim. P. 9.01, subd. 1(1)(a), (b). And that obligation continued even if Sturdivant did not repeat his request for disclosure or ask for more detailed disclosures. *See* Minn. R. Crim. P. 9.03, subd. 2.

We further observe that although it may be common practice within a particular judicial district for the prosecutor to include only a potential witness's city and state on a witness list, that practice does not relieve the prosecutor of the duty to comply with rule 9.01, subdivision 1. The state notes that "[b]ecause witness lists are often filed with the court and publicly available, it is uncommon, particularly in a case involving a prosecutor's certificate, for the witness list to include location information that is any more specific than the city and state." But the state does not cite authority requiring it to make its rule 9.01, subdivision 1, disclosures in a publicly available witness list. *See* Minn. R. Crim. P. 9 cmt. ("It is anticipated that the discovery provided for . . . will be accomplished informally between the prosecutor and defense counsel."). Regardless of the form of disclosure selected by the prosecutor, the prosecutor must comply with the disclosure rules.

In sum, the prosecutor identified K.R. as a witness who may be called at trial and K.R. had information relating to the case. Under the rules of criminal procedure, once the prosecutor learned that communications could be sent to K.R. at the workhouse

address—even if only temporarily—the prosecutor was obligated to timely disclose that address to Sturdivant. *See* Minn. R. Crim. P. 9.01, subd. 1, 9.03, subd. 2. The prosecutor's failure to do so violated rule 9.

The Prejudice Inquiry

Our de novo conclusion that a discovery violation occurred does not end our analysis.

> Generally, a defendant must show not only a discovery violation, but also prejudice as a result of the discovery violation before a new trial will be ordered. . . . To establish prejudice a defendant must show that a reasonable probability exists that the outcome of the trial would have been different if the disputed evidence had been produced. This determination rests within the discretion of the trial judge, whose determination will only be reversed when the discovery violation, viewed in the light of the whole record, appears to be inexcusable and so prejudicial that the defendant's right to a fair trial was denied.

Boldman, 813 N.W.2d at 109 (citations omitted).

Caselaw indicates that when assessing the prejudicial impact of a discovery violation, courts focus on the impact of the nondisclosure at trial. For example, a court may consider whether the defendant had an opportunity to "receive and review" the undisclosed information during trial, whether the defendant was able to achieve the same trial objectives without the undisclosed evidence, and whether the evidence against the defendant at trial was strong. *See State v. Jackson*, 770 N.W.2d 470, 480-81 (Minn. 2009) (finding no prejudice when the district court's order gave the defendant an opportunity to call for a recess to receive and review a previously undisclosed, unredacted transcript of a witness statement, the defendant was able to attack the

credibility of the witness even without the unredacted transcript, and the evidence against the defendant was strong). A court may also consider whether the undisclosed information is inconsistent with the state's theory of the case. *See State v. Colbert*, 716 N.W.2d 647, 656 (Minn. 2006) (finding no prejudice when the alleged discovery violation revealed information that did not change the state's theory of the case).

In a case in which the state made an untimely pretrial disclosure of the existence and identity of a witness who had provided potentially exculpatory evidence, the Minnesota Supreme Court found a discovery violation under rule 9.01 and considered whether the defendant was prejudiced by the violation and whether the district court erred by refusing to grant the defendant's request for a trial continuance so defendant could attempt to locate the witness. *State v. Holmes*, 325 N.W.2d 33, 34-35 (Minn. 1982). In deciding the issue, the supreme court reasoned that the witness's location at the time of trial was unknown; the witness was a transient and might have been difficult to locate; it was "questionable whether [the witness] was telling the truth" when he told a police officer that he had participated in the crime; if the witness had been located, it is not clear that he would have been willing to testify; and even if he had been willing to testify, it was not clear that his testimony would have "significantly aided defendant." *Id*. at 35. The supreme court found it "significant that the defense either [had] not made an effort to contact [the witness] since the trial, or if it [had] made an effort, [had] not succeeded." *Id*. "In other words, it [was] not clear that if [the supreme court] were to grant defendant a new trial, the new trial would be any different than the first one." *Id.* Thus, the supreme court concluded that the record did not establish that the defendant was

prejudiced by "the prosecutor's failure to disclose earlier or by the trial court's refusal to grant the requested continuance." *Id.*

In this case, the district court noted that to obtain relief under rule 9, Sturdivant "must show a discovery violation, and that prejudice resulted from the discovery violation." The district court found "neither." But the analysis in the district court's supporting memorandum primarily addresses its finding that no violation occurred. However, the memorandum does explain that

> [t]he [c]ourt finds the Defense inquired about the specific whereabouts of other witnesses, but not about more specific whereabouts of [K.R.]. It appears neither party believed [K.R.] could provide identification testimony, and she was not thought to be a relevant witness. Furthermore, the Defense made no inquiries into [K.R.'s] location.

The parties refer to the above-quoted portion of the district court's memorandum as the court's reasoning regarding its prejudice determination. And the state's arguments on appeal encompass that reasoning. We therefore turn our attention to the state's arguments.

The state first argues that because evidence regarding K.R.'s address at the time of the first trial does not, in and of itself, negate Sturdivant's guilt, prejudice does not result from its nondisclosure. That argument is unavailing because it fails to recognize that although the state's constitutional disclosure obligation under *Brady* is limited to "favorable" evidence, its obligations under rule 9.01, subdivision 1, are not similarly limited. *See State v. Brown*, 815 N.W.2d 609, 622 (Minn. 2012) (stating that to establish a *Brady* violation, a defendant must show three things, the first of which is that "the

evidence at issue is favorable to the accused, either because it is exculpatory or it is impeaching"). Rule 9.01, subdivision 1, does not distinguish between favorable and unfavorable information. Instead, the prosecutor must allow access "to *all* matters within the prosecutor's possession or control that *relate to* the case." Minn. R. Crim. P. 9.01, subd. 1 (emphasis added). The state must disclose the "addresses of witnesses who may be called at trial" and the "addresses of anyone else with information relating to the case," regardless of whether the witness or information is favorable to the defense. Minn. R. Crim. P. 9.01, subd. 1(1)(a), (b). Moreover, the state's disclosure obligations under rule 9.01, subdivision 1, are not limited to information that is legally "relevant," that is "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Such a restriction would be inconsistent with the policy objectives that underlie the broad discovery provisions in rule 9. *See Lindsey*, 284 N.W.2d at 372-73. In sum, the state's argument that Sturdivant was not prejudiced because K.R.'s address, in and of itself, did not negate his guilt is unavailing.

Second, the state argues that "[a]ppellant cannot demonstrate prejudice because he was not interested in K.R. and would not have done anything with more specific information regarding K.R.'s location." We are unaware of any caselaw basing a prejudice determination on the defendant's efforts to discover undisclosed information. *Cf. Holmes*, 325 N.W.2d at 35 (noting that defendant did not attempt to locate the witness *after* disclosure and trial). Unlike the analysis applicable to Sturdivant's newly discovered evidence claim, which is discussed below, precedent does not require a

defendant to show due-diligence when proving the prejudicial impact of a discovery violation. *See Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997) (stating that to obtain a new trial based on newly discovered evidence, the defendant must establish, in part, that the evidence could not have been discovered through due diligence before trial). So long as a defendant makes a request, the onus is on the prosecutor to make the disclosures specified in rule 9.01, subdivision 1, and the rule does not require more than one request. *See* Minn. R. Crim. P. 9.01. Thus, when determining prejudice, it is not appropriate to focus on Sturdivant's additional efforts to obtain the undisclosed information.

We are also unaware of any caselaw that supports basing the prejudice determination on speculation regarding whether Sturdivant's attorney would have investigated the information if it had been disclosed by the prosecutor. Such an approach is inconsistent with public policy that disfavors restricting a defense attorney's ability to represent his or her client. In the context of ineffective-assistance-of-counsel claims, the supreme court has repeatedly stated that the judiciary generally will not review attacks on counsel's trial strategy and that "[t]he extent of counsel's investigation is considered a part of trial strategy." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). The reluctance "is grounded in the public policy of allowing counsel to have the flexibility to represent a client to the fullest extent possible." *Id.* (quotation omitted).

Given the judiciary's typical refusal to second guess a defense attorney's investigative strategy when assessing his or her effectiveness, we are equally hesitant to speculate regarding the extent to which a defense attorney would have investigated information that was not disclosed by the prosecutor. However, we need not decide

whether such an inquiry is ever proper because in this case, the record refutes the state's assertion that defense counsel would not have interviewed K.R. even if the prosecutor had disclosed her specific location. It is undisputed that once defense counsel learned that K.R. was at the workhouse, he promptly sent an investigator to interview her and obtained an exculpatory statement from her.

The state's third argument is that "[a]ppellant cannot show prejudice because even if K.R.'s new statements were obtained before and introduced at trial, there is no reasonable probability that the outcome of the trial would have been different." The state specifically addresses the strength of the state's evidence at trial, the credibility of the state's witnesses, and purported inconsistencies in K.R.'s statements. Those are relevant considerations under caselaw. *See Jackson*, 770 N.W.2d at 481 (considering whether the evidence against the defendant was strong); *Colbert*, 716 N.W.2d at 656 (considering whether the alleged discovery violation revealed information that changed the state's theory of the case); *Holmes*, 325 N.W.2d at 35 (considering whether it was "questionable whether [the newly disclosed witness] was telling the truth" and whether the witness's testimony would have "significantly aided defendant").

Sturdivant also addresses the strength of the state's evidence. He contends that the state's witnesses provided "questionable identifications" and had "flimsy credibility." Sturdivant further contends that "[t]he state's case relied entirely on the testimony of two, highly questionable witnesses" and that in such a case, "there is nothing more prejudicial than the suppression of the statement of another eyewitness who would exonerate the defendant."

In sum, both parties have provided detailed, factual arguments regarding the strength of the state's trial evidence and whether exonerating testimony from K.R. likely would have resulted in a different outcome at trial. Those arguments are consistent with the analytical approach in precedent determining whether a discovery violation was prejudicial. But resolution of those arguments is entrusted to the district court's sound discretion. *See Boldman*, 813 N.W.2d at 109. The arguments therefore should be considered and determined in the first instance by the district court, which had the benefit of first-hand observation of the evidence at trial, including witness testimony.

Because the district court erred by finding that the prosecutor did not violate rule 9.01, subdivision 1, and in determining that the nondisclosure did not prejudice Sturdivant, we reverse the district court's order denying postconviction relief on Sturdivant's claim under Minn. R. Crim. P. 9.01 and remand for a determination whether, under precedent, a reasonable probability exists that the outcome of the trial would have been different if K.R.'s exculpatory statement was available to Sturdivant at trial.

As to the process on remand, Sturdivant argues that he is entitled, "at a minimum," to an evidentiary hearing on his postconviction petition. A postconviction court must hold an evidentiary hearing on a postconviction petition "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2012). To obtain a hearing, a petitioner must allege facts that, if proved by a fair preponderance of the evidence, would entitle him or her to relief. *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002). An evidentiary hearing is required when disputed material facts must be resolved to determine the postconviction

issues on the merits. *Opsahl*, 677 N.W.2d at 423. A summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

Because the record does not conclusively show that Sturdivant is "entitled to no relief" on his rule 9 claim, the district court abused its discretion by denying the claim without an evidentiary hearing. *See* Minn. Stat. § 590.04, subd. 1. An evidentiary hearing is appropriate in this case. When assessing the prejudicial impact of the discovery violation, the district court may properly consider whether it is "questionable" that K.R. was telling the truth in her posttrial statement to the defense investigator, whether K.R. is currently available and willing to testify, and if so, whether her testimony would significantly aid appellant. *See Holmes*, 325 N.W.2d at 35. Those factors concern K.R.'s credibility as a witness. "An evidentiary hearing provides the postconviction court the means for evaluating the credibility of a witness." *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). We therefore remand for an evidentiary hearing to determine whether the prosecutor's discovery violation under rule 9.01 was prejudicial and necessitates a new trial.

II.

We next consider whether the discovery violation is a constitutional error. Sturdivant argues that "[t]he state's failure to disclose the potentially exculpatory evidence of [K.R.'s] location and address, which led to the discovery of her exculpatory statement, violates its obligations under *Brady v. Maryland* and Rule 9 to disclose exculpatory evidence."

"In *Brady*, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (quotation omitted). "The Court has subsequently defined three components necessary for a 'true *Brady* violation.'" *Id.* (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936 (1999)). "First, the evidence at issue must be favorable to the accused, either because it is exculpatory or it is impeaching." *Id.* "Second, the evidence must have been suppressed by the state, either willfully or inadvertently." *Id.* "Third, prejudice to the accused must have resulted." *Id.* "All three components must be met in order for a *Brady* violation to be found." *Id.*

> The first two components of the *Brady* test are embodied in Rule 9.01 of the Minnesota Rules of Criminal Procedure, which provides that the state must disclose to defense counsel any relevant written or recorded statements which relate to the case within the possession or control of the prosecution as well as any material or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

Id. at 460 (quotation omitted); *see also* Minn. R. Crim. P. 9.01, subd. 1(2), (6). Appellate courts "review a postconviction court's determinations of legal issues de novo." *Id.* at 459.

A *Brady* violation does not occur unless "favorable" evidence is suppressed by the state. *See Woodruff v. State*, 608 N.W.2d 881, 888 (Minn. 2000) (concluding that there had been no *Brady* violation when the undisclosed evidence was not favorable to the

defendant). The Minnesota Supreme Court recently described *Brady* evidence as evidence that has "*apparent* and material exculpatory value." *State v. Hawkinson*, 829 N.W.2d 367, 372 (Minn. 2013) (emphasis added). Similarly, the Eighth Circuit Court of Appeals has stated that "[t]here is no duty to disclose evidence that is . . . neutral, speculative or inculpatory." *United States v. Flores-Mireles*, 112 F.3d 337, 340 (8th Cir. 1997).

Here, the state failed to disclose that K.R. was incarcerated at the workhouse at the time of the first trial. That information would have enabled the defense to contact K.R. But whether the undisclosed information was apparently exculpatory must be determined in the context of the information that K.R. had provided at that time. K.R. did not tell the police that Sturdivant was not one of the robbers. At best, K.R.'s only pretrial statement regarding Sturdivant's involvement in the robbery was neutral. Thus, disclosure of evidence regarding her current location for possible defense investigation was also neutral. And because evidence of her current location was neutral instead of favorable, it is not *Brady* evidence.

Sturdivant argues that "at the very least, [K.R.'s] whereabouts and specific address was potentially exculpatory evidence." This argument is unavailing. "While it is true that the Fourteenth Amendment requires the State to disclose exculpatory evidence to defendants, the same is not true for possible exculpatory evidence." *Bielejeski v. Comm'r of Pub. Safety*, 351 N.W.2d 664, 667 (Minn. App. 1984) (citation omitted). We therefore conclude that the state did not suppress favorable *Brady* evidence and that the state's failure to disclose K.R.'s current location is not a constitutional violation.

III.

Sturdivant argues that "[t]he newly-discovered evidence of [K.R.'s] exculpatory statement that [he] was not one of the men who committed the robbery is newly-discovered evidence that entitles [him] to a new trial." A new trial based upon newly discovered evidence may be granted when a defendant proves: "(1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result." *Rainer*, 566 N.W.2d at 695. "The decision whether to grant a new trial based upon newly-discovered evidence rests with the trial court and will not be disturbed unless there is an abuse of discretion." *Berry v. State*, 364 N.W.2d 795, 796 (Minn. 1985).

The district court concluded that Sturdivant failed to "establish, by a preponderance of the evidence, that the newly discovered evidence could not have been discovered through due diligence, before trial." We agree. Sturdivant could have asked the prosecutor for more specific information regarding K.R.'s location. He failed to do so. And a MNCIS search for K.R. would have revealed K.R.'s contacts with the court system, including incarcerations. Moreover, defense counsel's postconviction affidavit does not establish due diligence. It states: "In September of 2011, I asked my defense investigator to try and locate [K.R.]. My investigator was unable to locate her. I did not know [K.R.'s] whereabouts or address at the time of either the July or October, 2011

trial." But a showing of due diligence requires some explanation of Sturdivant's efforts to find K.R.

Because Sturdivant must establish all four elements of the newly discovered evidence standard and the district court properly concluded that Sturdivant failed to show due diligence, the district court did not abuse its discretion by rejecting Sturdivant's newly discovered evidence claim.

IV.

Sturdivant argues that the district court erred by overruling his *Batson* objection to the state's peremptory challenge to prospective juror number 12, an African-American woman. "Generally, each party has a limited number of peremptory challenges in a jury trial." *State v. Diggins*, ___ N.W.2d ___, ___, No. A08-1143, slip op. at 6 (Minn. Aug. 28, 2013). "Unlike a challenge for cause, a peremptory challenge allows a party to strike a prospective juror without having to explain the reason for the strike." *Id.* But "[t]he use of peremptory challenges to exclude potential jurors is subject to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *State v. Pendleton*, 725 N.W.2d 717, 723 (Minn. 2007) (citing *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712 (1986)). "A peremptory challenge against a prospective juror on account of her race denies equal protection both to the prospective juror, because it denies her the right to participate in jury service, and to the defendant, because it violates his right to be tried by a jury made up of members selected by nondiscriminatory criteria." *Id.*

The three-step *Batson* analysis determines whether the exercise of a peremptory challenge was motivated by racial discrimination.

First, the defendant must make a prima facie showing that the [s]tate exercised its peremptory challenge against a prospective juror on the basis of race. To make such a showing, the defendant must establish that one or more members of a racial group have been peremptorily excluded from a jury and that the circumstances of the case raise an inference that the exclusion was based on race.

Second, once the defendant makes a prima facie showing, the burden shifts to the [s]tate to articulate a race-neutral explanation for exercising the peremptory challenge. The explanation need not be persuasive, or even plausible. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered is deemed race neutral.

Third, if the [s]tate articulates a race-neutral explanation, the district court must determine whether the defendant has carried his burden of proving purposeful discrimination. Specifically, the court must determine whether the defendant has shown that the peremptory challenge was motivated by racial discrimination and that the [s]tate's proffered explanation was merely a pretext for the discriminatory motive. The defendant ultimately carries the burden of persuasion to demonstrate the existence of purposeful discrimination; this burden never shifts from the opponent of the peremptory challenge.

Because the existence of racial discrimination in the use of a peremptory challenge is a factual determination, [appellate courts] give great deference to the district court's ruling and will uphold the ruling unless it is clearly erroneous. This deference is warranted because the district court occupies a unique position to observe the demeanor of the prospective juror and evaluate the credibility of the party that exercised the peremptory challenge, and the record may not reflect all of the relevant circumstances that the court may consider.

Diggins, slip op. at 6-8 (citations and quotations omitted). But if "the district court erred in applying *Batson*, [appellate courts] will examine the record without deferring to the district court's analysis." *Pendleton*, 725 N.W.2d at 726.

In this case, Sturdivant challenged the state's peremptory strike of prospective juror number 12, an African-American woman. The state responded that Sturdivant failed to make a prima facie showing that the juror was struck on the basis of race. The district court then asked the state, "Just to be clear, your basis for striking that juror was?" The state informed the court that it struck juror number 12 because "the father of her two children was currently incarcerated in Hennepin County, has pending drug charges, and it was subsequent to a police raid so her family . . . her and her kids have both been affected by that" and "it is a very close family member that has been both currently involved in the criminal justice system and has arrests." At that time, defense counsel stated he had "made the prima facie showing" because if prospective juror number 12 were stricken "we have one potential African American gentleman left and an Asian fellow." The court responded:

> I'm going to overrule. I think that there is a race neutral reason. The proximity, the closeness of the family relationship as well as the currency of her partner's involvement with current criminal justice matters I think poses a sufficient, sufficiently neutral response despite what her responses may be. I think that she probably does believe that she can be a fair juror but I don't think that this is a discriminatory reason for striking her so I would overrule that.

The supreme court has stated that "[i]t is important for the court to announce on the record its analysis of each of the three steps of the *Batson* analysis and, if it reaches

step three, to state fully its factual findings, including any credibility determinations." *State v. Reiners*, 664 N.W.2d 826, 832 (Minn. 2003). "The importance of clarity at each step of the analysis is that the opponent has the burden of proving a prima facie case, the proponent has the burden of production of a race-neutral explanation, and the opponent has the ultimate burden of proving pretext and discriminatory intent." *Pendleton*, 725 N.W.2d at 725 (quotation omitted). After Sturdivant noted his *Batson* objection, the district court should have determined whether a prima facie case of racial discrimination had been shown. Instead, the district court stated that there was a race-neutral reason for the peremptory strike and concluded that Sturdivant had not proved purposeful discrimination. The district court essentially "collapsed the *Batson* analysis into one step." *Id*. at 727. Because the district court erred in applying *Batson*, we will examine the record without deferring to the district court's analysis." *See id*. at 726.

We first determine whether Sturdivant made a prima facie showing of racial discrimination. "To make [a prima facie] showing, the defendant must establish that one or more members of a racial group have been peremptorily excluded from a jury and that the circumstances of the case raise an inference that the exclusion was based on race." *Diggins*, slip op. at 6 (quotation omitted). "Whether the circumstances of the case raise an inference of discrimination depends in part on the races of the defendant and the victim." *Angus v. State*, 695 N.W.2d 109, 117 (Minn. 2005). But "the use of a peremptory challenge to remove a member of a racial minority does not necessarily establish a prima facie case of discrimination." *Reiners*, 664 N.W.2d at 831.

Sturdivant asserts that because "he is African-American, and the struck juror was African-American," a prima facie case is established. But there is no indication of racial overtones in this case. There is nothing to indicate that the defendant and the victim were of different races. *See State v. Stewart*, 514 N.W.2d 559, 563 (Minn. 1994) ("There were no racial overtones to the case since both the defendant and the victim are white . . . ."). The jury panel included four persons of color. One of the four was struck for cause by mutual consent of the parties. After the state struck prospective juror 12, an African-American male and an Asian-American male still remained on the panel. We conclude that Sturdivant did not establish a prima facie case of discrimination.

Moreover, as to the second element, Sturdivant concedes that the state presented a race-neutral reason for striking prospective juror 12, namely that the father of her children was currently in jail. *See State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009) ("We have consistently held that a family member's involvement with the legal system is a legitimate race-neutral reason for the [s]tate to exercise a peremptory challenge.").

Lastly, even if we had determined that Sturdivant made a prima facie showing, Sturdivant failed to meet his ultimate burden of proving that the state's peremptory challenge was motivated by racial discrimination. "[D]emonstration of pretext implies a two-part analysis: (1) a demonstration that the proffered race-neutral reason is not the real reason for the strike and (2) a demonstration that the real reason was the race of the veniremember." *Angus*, 695 N.W.2d at 117. "One way to demonstrate the first part of pretext is to challenge the relevance or validity of the proffered race-neutral reason, but the failure of that reason does not demonstrate the second part, that the real reason was

based on race." *Id*. "Where the proponent's explanation of a peremptory challenge is race-neutral, and there is no evidence from which to infer an intent to discriminate, the *Batson* objection must be overruled." *Reiners*, 664 N.W.2d at 834.

Sturdivant argues that the father of juror number 12's children was not a "close family member" because juror 12 identified herself as single and the father did not live with her at the time of the incident that gave rise to the criminal charges against father. We are not persuaded. The record indicates that the father calls juror 12 from jail to discuss the children and juror 12 found out about the charges against father when she attempted to drop the children off with him.

Sturdivant further argues that "a compelling indication that the prosecutor's articulated reason for the strike was a pretext for racial discrimination is the fact that he did not strike another similarly-situated juror." That juror's brother was incarcerated for criminal vehicular homicide. But those criminal charges were brought in a different county and the juror expressed only "complimentary" feelings about the way those charges were handled.

In sum, although the district court did not strictly comply with the prescribed procedure for conducting a *Batson* analysis, the district court correctly overruled Sturdivant's objection to the state's peremptory strike of prospective juror 12.

Conclusion

To summarize, we reverse the district court's denial of postconviction relief on appellant's discovery-violation claim under rule 9 and remand for an evidentiary hearing for the district court to determine, under precedent and consistent with this opinion,

whether the violation prejudiced appellant such that a new trial is warranted. But we affirm the district court's denial of postconviction relief on appellant's *Brady* and newly discovered evidence claims. We also affirm the district court's denial of appellant's *Batson* challenge at trial.

Affirmed in part, reversed in part, and remanded.